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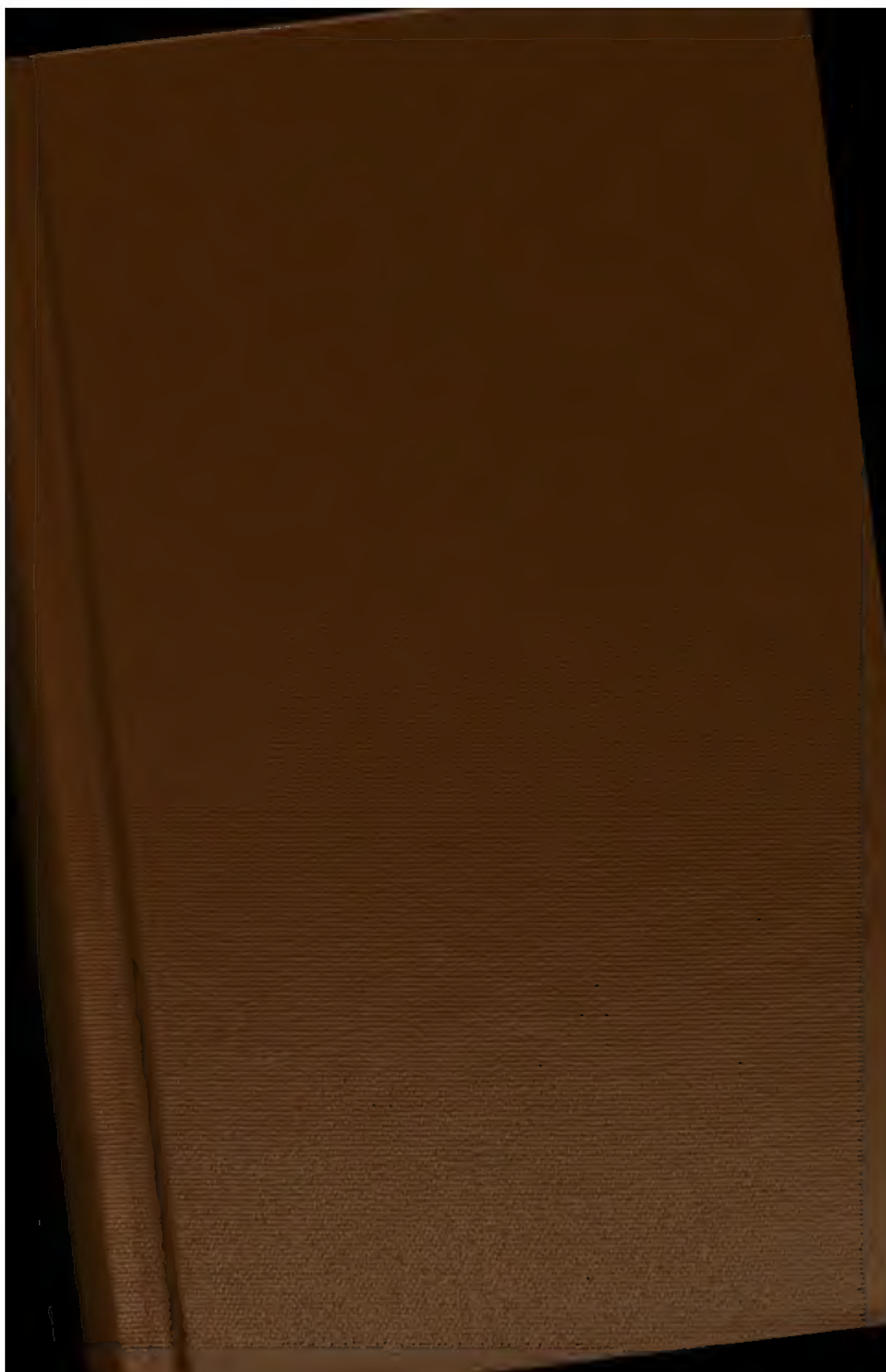
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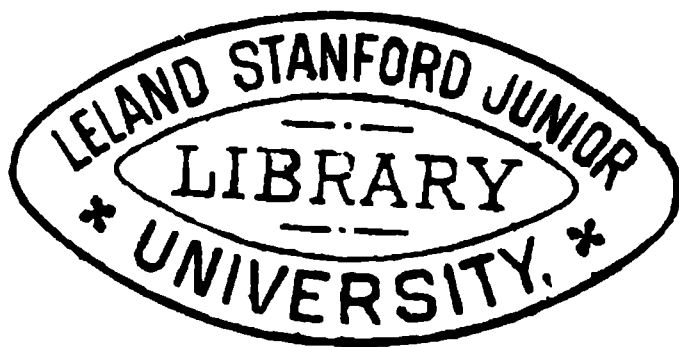
THE
AMERICAN AND ENGLISH
RAILROAD CASES.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND.

EDITED BY
WILLIAM M. MCKINNEY.

VOLUME LXI.

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THE
AMERICAN AND ENGLISH
RAILROAD CASES

VOL. LXI.

COVINGTON BRIDGE Co.

v.

KENTUCKY.

(154 *United States*, 204).

Power of State to Regulate Tolls on Interstate Bridge—Interstate Commerce.—Traffic across the Ohio river is interstate commerce, and a bridge across the river is an instrument of such commerce, hence the state of Kentucky has no power to regulate tolls upon a bridge crossing the river from a point within that state to a point in Ohio without the concurrence of the latter state in the proposed tariff or the assent of congress.

Same—Obligation of Contract Between States.—By the concurrent acts of the legislatures of Kentucky and Ohio, a bridge company was made a corporation of each state, and authorized to fix rates of toll. By an act of congress (Feb. 17, 1865, ch. 39), the bridge was declared to be a lawful structure when completed in accordance with the laws of the two states, but no provision was made as to tolls, thereby manifesting the intention of congress that the rates of toll should be as established by the two states. *Held*, that the original acts of incorporation constituted a contract between the bridge corporation and both states which could not be altered by one state without the consent of the other. Per Mr. Chief Justice FULLER, Mr. Justice FIELD, Mr. Justice GRAY, and Mr. Justice WHITE.

ERROR to the court of appeals of the state of Kentucky.

This was an indictment in a court of the state of Kentucky against the Covington & Cincinnati Bridge Company for violation of a statute of that state regulating tolls on defendant's bridge. A demurrer to the indictment was sustained, but the judgment thereon was reversed

Case stated.

on appeal by the court of appeals of the state (54 Am. & Eng. R. Cas. 461), and, on trial, defendant was adjudged guilty, and the conviction was affirmed on appeal by the court of appeals. Defendant brought error.

This was an indictment found by the grand jury of Kenton county, Ky., against the defendant bridge company for demanding and collecting illegal tolls, refusing to sell tickets at the rates required by law, and for failing to keep an office for the sale of tickets at its bridge in said county.

The Covington & Cincinnati Bridge Company was incorporated under an act of the legislature of Kentucky, approved February 17, 1846, the third section of which required the confirmation of the act by the state of Ohio before the corporation should open its books for subscription; and the eighth section of which declared that "the president and directors shall have the right to fix the rates of toll for passing over said bridge, and to collect the same from all and every person or persons passing thereon, with their goods, carriages, or animals of every description or kind; provided, however, that the said company shall lay before the legislature of this state a correct statement of the cost of said bridge, and an annual statement of the tolls received for passing the same, and also the cost of keeping said bridge in repair, and of the other expenses of the company; and the said president and directors shall, from time to time, reduce the rates of toll, so that the net profits of said bridge shall not exceed fifteen per cent per annum, after the proper deductions are made for repairs and charges of other descriptions."

By an act of the legislature of Ohio, enacted March 9, 1849, this company was made a body corporate and politic of that state, "with the same franchises, rights, and privileges, and subject to the same duties and liabilities," as were specified in its original incorporation; and with a further proviso that "nothing herein contained shall be construed to take away the jurisdiction of this state to the centre of the said bridge, nor in anywise to acknowledge the jurisdiction of the commonwealth of Kentucky this side of the said centre."

On March 20, 1850, this act of confirmation was amended by the legislature of Ohio by granting the company "power to enter upon any lands in the city of Cincinnati, from low-water mark in the Ohio river northwardly, not exceeding one hundred feet in width, to Front street, and appropriate the same," for passageways and abutments, etc.

The original act of incorporation was amended by the legislature of Kentucky by the following, among other subsequent acts:

(1) By act of February 23, 1856, authority was given to

increase the capital stock from \$300,000 to \$700,000, with power in the city of Covington to subscribe for and purchase \$100,000.

(2) By act of February 6, 1858, the company was authorized to issue preferred stock under certain restrictions, such stockholders to receive dividends of 6 per cent.

(3) By act of February 5, 1861, the capital stock was increased to \$1,000,000, one-half of such amount in preferred stock, and to pledge the revenues of the company for the payment of dividends upon such preferred stock to the extent of 15 per cent per annum.

(4) By act of January 21, 1865, the capital stock was increased to \$1,250,000, the additional \$250,000 being preferred stock, the holders of which should enjoy all the benefits, privileges, and immunities to which the holders of the existing stock were entitled.

By the sixth section of this act the legislature reserved the right to change, alter, or amend the original charter, "but not so as to abridge or injure legal or equitable rights acquired thereunder."

(5) By act of February 25, 1865, the above sixth section was repealed.

(6) By act of congress of February 17, 1865, the bridge was declared to be a lawful structure and post-road for the conveyance of the mails of the United States. 13 Stat. 431.

The bridge was completed and opened for travel January 1, 1867.

On April 9, 1890, the legislature of Kentucky passed another act amendatory of the act of incorporation, and out of which this prosecution arose, providing that it should be unlawful for any person or corporation to charge, collect, demand, or receive for passage over the bridge spanning the Ohio river, constructed under such act of incorporation, any toll, fare, or compensation greater than, or in excess of, certain rates prescribed by the act, which were much less than the directors had fixed upon under the eighth section of the act of incorporation. The second section provided that the company should sell passage tickets over their bridge at these rates, entitling the holder to passage either way over said bridge; and, by the third section, the company was required to keep an office within the county of Kenton constantly open for the sale of such tickets, and keep conspicuously posted a schedule of the tolls fixed in pursuance of the act.

The company failing to conform to this last-mentioned act, this indictment was filed May 9, 1890. Defendant demurred thereto, and the case was submitted upon this demurrer and a statement of facts, showing the cost of the bridge structure

and offices to have been \$1,855,462.36; the per cent of net earnings on cost for first 23 years, 4.82; the per cent of net earnings on cost for the year 1889, 6.14; the estimated per cent of net earnings on cost for 1890, 4.09, under the charges fixed by the directors; the estimated percentage of net earnings on cost for the year 1890, under the act of which complaint was made, 1.06. The court sustained the demurrer and dismissed the indictments upon the ground that the act of 1890 impaired the obligation of the contract contained in the eighth section of the original act. The commonwealth appealed to the court of appeals, by which the judgment of the court below was reversed, and the case remanded, with directions to overrule the demurrer, and for further proceedings. The case was thereupon remanded to the lower court and submitted without a jury. The court adjudged the defendant guilty, and imposed a fine of \$1000, from which judgment the defendant again appealed to the court of appeals, which affirmed the judgment of the court below, and certified, at the request of the appellant, the following questions as arising under the constitution and laws of the United States:

(1) Whether the act of 1890 was within the constitutional inhibition of laws impairing the obligation of contracts.

(2) Whether such acts were in violation of the exclusive power of congress to regulate commerce among the states.

(3) Whether said act was in violation of the fourteenth amendment, prohibiting the taking of private property without due process of law.

Defendant thereupon sued out a writ of error from this court.

Solicitor-General Lawrence Maxwell, Jr., William M. Ramsey, James W. Bryan, John F. Fisk, and Chas. H. Fisk, for plaintiff in error.

William J. Hendrick, Attorney-General of the state of Kentucky, and *William Goebel*, for defendant in error.

Mr. Justice BROWN, after stating the facts in the foregoing language, delivered the opinion of the court.

This case involves the power of a state to regulate tolls upon a bridge connecting it with another state, without the assent of congress, and without the concurrence of such other state in the proposed tariff.

The right of the commonwealth of Kentucky to prescribe a schedule of charges in this instance is contested, not only upon the ground that such regulation is an interference with interstate commerce, but upon the further ground that it im-

pairs the obligation of the contract contained in the original charter of the company.

The power of congress over commerce between the states, and the corresponding power of individual states over such commerce, have been the subject of such frequent adjudication in this court, and the relative powers of congress and the states with respect thereto are so well defined, that each case, as it arises, must be determined upon principles already settled, as falling on one side or the other of the line of demarcation between the powers belonging exclusively to congress, and those in which the action of the state may be concurrent. The adjudications of this court with respect to the power of the states over the general subject of commerce are divisible into three classes : First, those in which the power of the state is exclusive ; second, those in which the states may act in the absence of legislation by congress ; third, those in which the action of congress is exclusive, and the states cannot interfere at all.

The first class, including all those wherein the states have plenary power, and congress has no right to interfere, concern the strictly internal commerce of the state, and, while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. Under this power the states may authorize the construction of highways, turnpikes, railways, and canals between points in the same state, and regulate the tolls for the use of the same (*Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456), and may authorize the building of bridges over nonnavigable streams, and otherwise regulate the navigation of the strictly internal waters of the state,—such as do not, by themselves or by connection with other waters, form a continuous highway over which commerce is or may be carried on with other states or foreign countries (*Veazie v. Moor*, 14 How. 568 ; *The Montello*, 11 Wall. 411, 20 Wall. 430). This is true notwithstanding the fact that the goods or passengers carried or travelling over such highway between points in the same state may ultimately be destined for other states, and, to a slight extent, the state regulations may be said to interfere with interstate commerce. The states may also exact a bonus, or even a portion of the earnings of such corporation, as a condition to the granting of its charter. *Society v. Coite*, 6 Wall. 594 ; *Provident Inst. v. Massachusetts*, Id. 611 ; *Hamilton Manuf'g Co. v. Massachusetts*, Id. 632 ; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 456 ; *Ashley v. Ryan*, 153 U. S. 436, 45 Am. & Eng. Corp. Cas. 474.

Congress has no power to interfere with police regulations

relating exclusively to the internal trade of the states (U. S. v. De Witt, 9 Wall. 41; Patterson v. Kentucky, 97 U. S. 501), nor can it, by exacting a tax for carrying on a certain business, thereby authorize such business to be carried on within the limits of a state (License Tax Cases, 5 Wall. 462). The remarks of the chief justice in this case contain the substance of the whole doctrine: "Over this [the internal] commerce and trade congress has no power of regulation nor any direct control. This power belongs exclusively to the states. No interference by congress with the business of citizens transacted within a state is warranted by the constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject."

It was at one time thought that the admiralty jurisdiction of the United States did not extend to contracts of affreightment between ports of the United States, though the voyage were performed upon navigable waters of the United States. Allen v. Newberry, 21 How. 244. But later adjudications have ignored this distinction as applied to those waters. The Belfast, 7 Wall. 624, 641; The Lottawanna, 21 Wall, 558, 587; Lord v. Steamship Co., 102 U. S. 541.

Under this power, the states may also prescribe the form of all commercial contracts, as well as the terms and conditions upon which the internal trade of the state may be carried on. The Trade-mark cases, 100 U. S. 82.

Within the second class of cases—those of what may be termed concurrent jurisdiction—are embraced laws for the regulation of pilots (Cooley v. Board, 12 How. 299; Steamship Co. v. Joliffe, 2 Wall. 450; *Ex parte* McNeil, 13 Wall. 236; Wilson v. McNamee, 102 U. S. 572); quarantine and inspection laws and the policing of harbors (Gibbons v. Ogden, 9 Wheat, 1, 203; City of New York v. Miln, 11 Pet. 102; Turner v. Maryland, 107 U. S. 38; Morgan's Louisiana & T. R. & S. S. Co. v. Board of Health, 118 U. S. 455; the improvement of navigable channels (Mobile Co. v. Kimball, 102 U. S. 691; Escanaba & L. M. Transp. Co. v. Chicago, 107 U. S. 678, 2 Am. & Eng. Corp. Cas. 220; Huse v. Glover, 119 U. S. 543); the regulation of wharves, piers, and docks (Cannon v. New Orleans, 20 Wall. 577; Keokuk Northern Line Packet Co. v. Keokuk, 95 U. S. 80; Northwestern Union Packet Co. v. St. Louis, 100 U. S. 423; Cincinnati, etc., Packet Co. v. Catlettsburg, 105 U. S. 559; Parkersburg, etc., Transp. Co. v. Parkersburg, 107 U. S. 691; Ouachita Packet Co. v. Aiken, 121 U. S. 444, 18 Am. & Eng. Corp. Cas. 504); the construction of dams and bridges across the navigable waters of a state (Wil-

son *v. Marsh Co.*, 2 Pet. 245; *Cardwell v. Bridge Co.*, 113 U. S. 205; *Pound v. Turck*, 95 U. S. 459); and the establishment of ferries (*Conway v. Taylor*, 1 Black, 603).

Of this class of cases it was said by Mr. Justice CURTIS, in *Cooley v. Board*, 12 How. 299, 318: "If it were admitted that the existence of this power in congress, like the power of taxation, is compatible with the existence of a similar power in the states, then it would be in conformity with the contemporary exposition of the constitution and with the judicial construction given from time to time by this court, after the most deliberate consideration, to hold that the mere grant of such a power to congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations." See, also, *Sturgis v. Crowninshield*, 4 Wheat. 192, 193. But, even in the matter of building a bridge, if congress chooses to act, its action necessarily supersedes the action of the state. *Pennsylvania v. Wheeling & B. Bridge Co.*, 18 How. 421. As matter of fact, the building of bridges over waters dividing two states is now usually done by congressional sanction. Under this power the state may also tax the instruments of interstate commerce as it taxes other similar property, provided such tax be not laid upon the commerce itself.

But wherever such laws, instead of being of a local nature and affecting interstate commerce but incidentally, are national in their character, the nonaction of congress indicates its will that such commerce shall be free and untrammelled, and the case falls within the third class,—of those laws wherein the jurisdiction of congress is exclusive. *Brown v. Houston*, 114 U. S. 622; *Bowman v. Railway Co.*, 125 U. S. 456, 23 Am. & Eng. Corp. Cas. 236. Subject to the exceptions above specified, as belonging to the first and second classes, the states have no right to impose restrictions, either by way of taxation, discrimination, or regulation, upon commerce between the states. That while the states have the right to tax the instruments of such commerce as other property of like description is taxed, under the laws of the several states, they have no right to tax such commerce itself, is too well settled even to justify the citation of authorities. The proposition was first laid down in *Crandall v. Nevada*, 6 Wall. 35, and has been steadily adhered to since. That such power of regulation as they possess is limited to matters of a strictly local nature, and does not extend to fixing tariffs upon passengers or merchandise carried from one state to another, is also set-

tled by more recent decisions, although it must be admitted that cases upon this point have not always been consistent.

The question of the power of the states to lay down a scale of charges, as distinguished from their power to impose taxes, was first squarely presented to the court in *Munn v. Illinois*, 94 U. S. 113, in which a power was conceded to the state to prescribe regulations and fix the charges of elevators used for the reception, storage, and delivery of grain, notwithstanding such elevators were used for the storage of grain destined for other states. The decision was put upon the ground that elevators were property "affected with a public interest," and that from time immemorial in England, and in this country from its first colonization, it had been customary to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charge to be made for services rendered, accommodations furnished, and articles sold. That the decision does not necessarily imply a power in the states to prescribe similar regulations with regard to railroads and other corporations directly engaged in interstate commerce is evident from the remarks of the chief justice (page 135) in delivering the opinion of the court: "The warehouses of these plaintiffs in error are situated and their business carried on exclusively within the limits of the state of Illinois. They are used as instruments by those engaged in state as well as those engaged in interstate commerce, but they are no more necessarily a part of commerce than the dray or the cart by which but for them grain would be transferred from one railroad station to another. Incidentally they may become connected with interstate commerce, but not necessarily so. Their regulation is a thing of domestic concern, and certainly, until congress acts in reference to their interstate relations, the state may exercise all the powers of government over them, even though in so doing it may operate upon commerce outside its immediate jurisdiction." The principle of this case has been recently affirmed in *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 21, and reaffirmed in *Brass v. North Dakota*, 153 U. S. 391, 45 Am. & Eng. Corp. Cas. 457, though not without strong opposition from a minority of the court.

The next case, viz., that of *Chicago, etc., Ry. Co. v. Iowa*, 94 U. S. 155, was a bill filed by the Chicago, Burlington & Quincy Railroad Company, an Illinois corporation, to restrain the prosecution of suits against it under "An act to establish reasonable maximum rates of charges for the transportation of freight and passengers on the different railroads of this state." The complainant was also the lessee of the Burlington & Missouri Railroad, in Iowa, the two roads being con-

nected by a bridge which crossed the Mississippi river at Burlington, thus making a continuous railroad from Chicago to Plattsmouth on the Missouri river, in Iowa. The case was held to be covered by *Munn v. Illinois*, the road, like the warehouse in that case, being situated within the limits of a single state. "Its business," said the chief justice, "is carried on there, and its regulation is a matter of domestic concern. It is employed in state as well as interstate commerce, and, until congress acts, the state must be permitted to adopt such rules and regulations as may be necessary for the promotion of the general welfare of the people within its own jurisdiction, even though in so doing those without may be indirectly affected." In short, the case was treated as one of internal commerce only.

In the next case, viz., *Peik v. Railway Co.*, 94 U. S. 164, it was held that under the constitution of Wisconsin, providing that all acts creating corporations within the state "may be altered or repealed by the legislature at any time after their passage," the legislature had a right to prescribe a maximum of charges to be made by the Chicago & Northwestern Railway Company for transporting persons or property within the state, or taken up outside the state and brought within it, or taken up inside and carried without. The vital question is not discussed at any length, but it was held that, until congress acted with reference to the relations of this company to interstate commerce, it was within the power of the state of Wisconsin to regulate its affairs so far as they were of a domestic concern. These three cases were cited with approval in *Ruggles v. Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49, in which the power of a state to limit the amount of charges by a railroad company for fares and freight was recognized.

A similar principle, though under quite a different state of facts, was involved in *Hall v. De Cuir*, 95 U. S. 485, which concerned an act of the legislature of Louisiana, requiring those engaged in the transportation of passengers among the states to give all persons travelling within that state, upon vessels employed in such business, equal rights and privileges in parts of the vessel, without distinction on account of race or color. The act was held to be a regulation of interstate commerce, and, therefore, unconstitutional and void. In the *Railroad Commission Cases*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577, it was held that the right of a state to limit the charges of a railroad company for the transportation of persons or property within its jurisdiction could not be granted away by its legislature unless by words of positive grant or words equivalent in law; and that a statute which granted to a railroad company the right from time to time to fix and

regulate the tolls and charges by them to be received for transportation did not deprive the state of its power to act upon the reasonableness of the tolls and charges so fixed and regulated. It was held that the state might, "beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the state, and it would seem to be a matter of domestic concern to prevent the company from discriminating against persons and places in Mississippi." "Nothing can be done by the government of Mississippi which will operate as a burden on the interstate business of the company, or impair the usefulness of its facilities for interstate traffic. * * * The commission is in express terms prohibited by the act of March 15, 1884, from interfering with the charges of the company for the transportation of persons or property through Mississippi from one state to another. The statute makes no mention of property taken up without the state and delivered within, nor of such as may be taken within and carried without." The court studiously avoided committing itself upon the question of the power of the commission over interstate commerce.

The prior cases were all reviewed, and the subject exhaustively considered in *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 26 Am. & Eng. R. Cas. 1, in which there came under review a statute of Illinois enacting that if any railroad company should, within that state, charge or receive for transporting passengers or freight of the same class the same or a greater sum for any distance than it does for a longer distance, it should be liable to a penalty for unjust discrimination. The defendant in that case made such discrimination in regard to goods transported over the same road or roads, from Peoria, Ill., and from Gilman, in Illinois, to New York, charging more for the same class of goods carried from Gilman than from Peoria, the former being 86 miles nearer the city of New York than the latter, this difference being in the length of line in the state of Illinois. The court held that such transportation was commerce among the states, even as to that part of the voyage which lay within the state of Illinois, and that the regulation of such commerce was confided to congress exclusively, under its power to regulate commerce between the states, and that the statute in question, being intended to regulate the transmission of persons or property from one state to another, was not within that class of legislation which the states may enact in the absence of legislation by congress. In delivering the opinion of the court, Mr. Justice MILLER cited the prior cases, and said that it must be admitted that, in a general way, the court treated the cases then before it as belonging to that class of regulations of commerce which, like

pilotage, bridging navigable rivers, and many others, could be acted upon by the states in the absence of any legislation by congress upon the same subject. He further observed that "the great question to be decided, and which was decided, and which was argued in all those cases, was the right of the state in which the railroad company did business to regulate or limit the amount of any of these traffic charges. The importance of that question overshadowed all others, and the case of *Munn v. Illinois* was selected by the court as the most appropriate one in which to give its opinion on that subject, because that case presented the question of a private citizen, or unincorporated partnership, engaged in the warehouse business in Chicago, * * * free from the question of continuous transportation through the several states; * * * and the question how far a charge made for a continuous transportation over several states, which included a state whose laws were in question, may be divided into separate charges for each state, in enforcing the power of the state to regulate the fares of its railroads, was evidently not fully considered." The substance of the opinion was that, if the prior cases were to be considered as laying down the principle that the states might regulate the charges for interstate traffic, they must be considered as overruled. See also *Bowman v. Railway Co.*, 125 U. S. 465, 23 Am. & Eng. Corp. Cas. 236. In none of the subsequent cases has any disposition been shown to limit or qualify the doctrine laid down in the *Wabash Case*, and to that doctrine we still adhere.

The real question involved here is whether this case can be distinguished from the *Wabash Case*. That involved the right of a single state to fix the charge for transportation from the interior of such state to places in other states. This case involves the right of one state to fix charges for the transportation of persons and property over a bridge connecting it with another state, without the assent of congress or such other state, and thus involving the further inquiries—First, whether such traffic across the river is interstate commerce; and, second, whether a bridge can be considered an instrument of such commerce.

The first question must be answered in the affirmative upon the authority of *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 13 Am. & Eng. Corp. Cas. 365, in which the state of Pennsylvania attempted to tax the capital stock of a corporation whose entire business consisted in ferrying passengers and freight over the river Delaware between Philadelphia, in Pennsylvania, and Gloucester, in New Jersey. This traffic was held to be interstate commerce, and, inasmuch as it appeared that the ferry boats were registered in New Jersey,

and were taxable there, it was held that there was no property held by the company which could be the subject of taxation in Pennsylvania, except the lease of a wharf in that state. "Congress alone," said the court (page 204, 114 U. S.), "therefore, can deal with such transportation; its non-action is a declaration that it shall remain free from burdens imposed by state legislation. Otherwise, there would be no protection against conflicting regulations of different states, each legislating for its own interests and products and against those of other states." If, as was intimated in that case, interstate commerce means simply commerce between the states, it must apply to all commerce which crosses the state line, regardless of the distance from which it comes or to which it is bound, before or after crossing such state line; in other words, if it be commerce to send goods from Cincinnati, in Ohio, to Lexington, in Kentucky, it is equally such to send goods or to travel in person from Cincinnati to Covington. And, while the reasons which influenced this court to hold in the Wabash Case that Illinois could not fix rates between Peoria and New York may not impress the mind so strongly when applied to fixing the rates of toll upon a bridge or ferry, the principle is identically the same; and, at least in the absence of mutual or reciprocal legislation between the two states, it is impossible for either to fix a tariff of charges.

With reference to the second question, an attempt is made to distinguish a bridge from a ferryboat, and to argue that, while the latter is an instrument of interstate commerce, the former is not. Both are, however, vehicles of such commerce, and the fact that one is movable and the other is a fixture makes no difference in the application of the rule. "Commerce" was defined in *Gibbons v. Ogden*, 9 Wheat. 1, 189, to be "intercourse," and the thousands of people who daily pass and repass over this bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool. While the bridge company is not itself a common carrier, it affords a highway for such carriage, and a toll upon such bridge is as much a tax upon commerce as a toll upon a turnpike is a tax upon the traffic of such turnpike, or the charges upon a ferry a tax upon the commerce across a river. A tax laid upon those who do the business of common carriers upon a certain bridge is as much a tax upon the commerce of that bridge as if the owner of the bridge were himself a common carrier.

Let us examine some of the cases which are supposed to countenance the doctrine that ferries and bridges connecting two states are not instruments of commerce between such states in such sense as to exempt them from state control. In

Conway v. Taylor, 1 Black, 603, a ferry franchise on the Ohio was held to be grantable under the laws of Kentucky to a citizen of that state who was a riparian owner on the Kentucky side. It was said not to be necessary to the validity of the grant that the grantee should have the right of landing on the other side or beyond the jurisdiction of the state. The opinion, however, did not pass upon the question of the right of one state to regulate the charge for ferriage, nor does it follow that, because a state may authorize a ferry or bridge from its own territory to that of another state, it may regulate the charges upon such bridge or ferry. A state may undoubtedly create corporations for the purpose of building and running steamships to foreign ports, but it would hardly be claimed that an attempt to fix a scale of charges for the transportation of persons or property to and from such foreign ports would not be a regulation of commerce and beyond the constitutional power of the state. It is true the states have assumed the right in a number of instances, since the adoption of the constitution, to fix the rates or tolls upon interstate ferries and bridges, and perhaps in some instances have been recognized as having the authority to do so by the courts of the several states. But we are not aware of any case in this court where such right has been recognized. Of recent years it has been the custom to obtain the consent of congress for the construction of bridges over navigable waters, and by the seventh section of the act of September 19, 1890 (26 Stat. 426, 454), it is made unlawful to begin the construction of any bridge over navigable waters until the location and plan of such bridge have been approved by the secretary of war, who has also been in frequent instances authorized to regulate the tolls upon such bridges where they connected two states. So, too, in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. 365, 3 Am. & Eng. Corp. Cas. 482, it was held that a state had the power to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the state, for boats which they owned and used in conveying, from a landing in the state, passengers and goods across a navigable river to another state. It was said that "the levying of a tax upon vessels or other water craft, or the exaction of a license fee by the state within which the property subject to the exaction has its situs, is not a regulation of commerce within the meaning of the constitution of the United States." Obviously the case does not touch the question here involved. Upon the other hand, however, it was held in *Moran v. New Orleans*, 112 U. S. 69, 5 Am. & Eng. Corp. Cas. 311, that a municipal ordinance of New Orleans imposing a license tax upon persons owning and running tow-

boats to and from the Gulf of Mexico was void as a regulation of commerce.

It is clear that the state of Kentucky, by the statute in question, attempts to reach out and secure for itself a right to prescribe a rate of toll applicable, not only to persons crossing from Kentucky to Ohio, but from Ohio to Kentucky; a right which practically nullifies the corresponding right of Ohio to fix tolls from her own state. It is obvious that the bridge could not have been built without the consent of Ohio, since the north end of the bridge and its abutments rest upon Ohio soil; and, without authority from that state to exercise the right of eminent domain, no land could have been acquired for that purpose. It follows that, if the state of Kentucky has the right to regulate the travel upon such bridge, and fix the tolls, the state of Ohio has the same right, and so long as their action is harmonious there may be no room for friction between the states; but it would scarcely be consonant with good sense to say that separate regulations and separate tariffs may be adopted by each state (if the subject be one for state regulation), and made applicable to that portion of the bridge within its own territory. So far as the matter of construction is concerned, each state may proceed separately by authorizing the company to condemn land within its own territory, but in the operation of the bridge their action must be joint, or great confusion is likely to result. It may be for the interest of Kentucky to add to its own population by encouraging residents of Cincinnati to purchase homes in Covington, and to do this by fixing the tolls at such a rate as to induce citizens of Ohio to reside within her borders. It might be equally for the interest of Ohio to prescribe a higher rate of toll to induce her citizens to remain and fix their homes within their own state, and, as persons living in one state and doing business in another would necessarily have to cross the bridge at least twice a day, the rates of toll might become a serious question to them. Congress, and congress alone, possesses the requisite power to harmonize such differences, and to enact a uniform scale of charges which will be operative in both directions. The authority of the state, so frequently recognized by this court, to fix tolls for the use of wharves, piers, elevators, and improved channels of navigation, has always been limited to such as were exclusively within the territory of a single state, thus affecting interstate commerce but incidentally, and cannot be extended to structures connecting two states without involving a liability of controversies of a serious nature. For instance, suppose the agent of the bridge company in Cincinnati should refuse to recognize tickets sold upon the Kentucky side, enabling

the person holding the ticket to pass from Ohio to Kentucky, it would be a mere *brutum fulmen* to attempt to punish such agent under the laws of Kentucky. Or, suppose the state of Ohio should authorize such agent to refuse a passage to persons coming from Kentucky who had not paid the toll required by the Ohio statute; or that Kentucky should enact that all persons crossing from Kentucky to Ohio should be entitled to a free passage, and thus attempt to throw the whole burden upon persons crossing in the opposite direction. It might be an advantage to one state to make the charge for foot passengers very low, and the charge for merchandise very high, and for the other side to adopt a converse system. One scale of charges might be advantageous to Kentucky in this instance, where the larger city is upon the north side of the river, while a wholly different system might be to her advantage at Louisville, where the larger city is upon the south side.

We do not wish to be understood as saying that in the absence of congressional legislation or mutual legislation of the two states, the company has the right to fix tolls at its own discretion. There is always an implied understanding with reference to these structures that the charges shall be reasonable, and the question of reasonableness must be settled, as other questions of a judicial nature are settled, by the evidence in the particular case. As was said in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 217, 13 Am. & Eng. Corp. Cas. 365: "Freedom from such imposition does not of course imply exemption from reasonable charges, as compensation for the carriage of persons in the way of tolls or fares, or from the ordinary taxation to which other property is subjected, any more than like freedom of transportation on land implies such exemption. Reasonable charges for the use of property, either on water or land, are not an interference with the freedom of transportation between the states secured under the commercial power of congress." Nor are we to be understood as passing upon the question whether, in the absence of legislation by congress, the states may by reciprocal action fix upon a tariff which shall be operative upon both sides of the river.

We do hold, however, that the statute of the commonwealth of Kentucky in question in this case is an attempted regulation of commerce which it is not within the power of the state to make. As was said by Mr. Justice MILLER in the *Wabash Case*: "It is impossible to see any distinction in its effects upon commerce of either class between a statute which regulates the charges for transportation and a statute which

levies a tax for the benefit of the state upon the same transportation."

The judgment of the court of appeals of Kentucky is therefore reversed, and the case remanded to that court for further proceedings in conformity with this opinion.

Mr. Chief Justice FULLER, Mr. Justice FIELD, Mr. Justice GRAY, and Mr. Justice WHITE concurred in the judgment of reversal for the following reasons :

The several states have the power to establish and regulate ferries and bridges, and the rates of toll thereon, whether within one state or between two adjoining states, subject to the paramount authority of congress over interstate commerce.

By the concurrent acts of the legislature of Kentucky in 1846, and of the legislature of Ohio in 1849, this bridge company was made a corporation of each state, and authorized to fix rates of toll.

Congress, by the act of February 17, 1865, c. 39, declared this bridge "to be, when completed in accordance with the laws of the states of Ohio and Kentucky, a lawful structure," but made no provision as to tolls ; and thereby manifested the intention of congress that the rates of toll should be as established by the two states. 13 Stat. 431.

The original acts of incorporation constituted a contract between the corporation and both states, which could not be altered by the one state without the consent of the other.

The Interstate-commerce Act, Annotated.—See appendix in Vol. 27, Am. & Eng. R. Cas.

What Constitutes Interstate Commerce.—See *Norfolk & Western R. Co. v. Commonwealth of Pennsylvania* (U. S.), 45 Am. & Eng. R. Cas. 9, and note, 14.

Transportation Between Points Within State—Effect of Passage Through Adjoining State.—In *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, it was held that transportation from one point to another point in the same state is not interstate commerce, although, in the course of such transportation, the merchandise passes the boundaries of the state. *Following* *Lehigh, V. R. Co. v. Pennsylvania*, 145 U. S. 192, 53 Am. & Eng. R. Cas. 679.

What Constitutes a Regulation of Interstate Commerce—Statutory Imposition of Liability for Breach of Contract of Carriage without the State.—In *McCann v. Eddy* (Mo., June 30, 18—4), 27 S. W. Rep. 541, it was held that Rev. Stat. 1889, § 944, providing that, whenever any property is received by a common carrier to be transferred from "one place to another within or without the state," the carrier shall be liable for all loss or damage thereto resulting from its own negligence, or that of any other carrier to which the property may be delivered, if construed as being operative beyond the boundaries of the state, is a regulation of interstate commerce, and as such violative of section 8, Art. 1 of the Constitution of the United States. *Citing* *Stanley v. Railway Co.*, 100 Mo. 435. The court said: "Any rule pertaining to the transportation of passengers

or merchandise from one state to another is a regulation of interstate commerce, and therefore, under the prohibition of the federal constitution, a state is inhibited from making such regulations. *Case of the State Freight Tax*, 82 U. S. 232. In order to conspicuously show that the statute, construed as plaintiffs desire, is plainly such a forbidden regulation, it is only necessary to suppose that the state of Illinois should enact laws in reference to merchandise transferred to that state from this state, and at variance with section 944 aforesaid. As is aptly elsewhere said: 'Commerce cannot flourish in the midst of such embarrassments.' *Hall v. De Cuir*, 95 U. S. 485. See, also, *Gibbons v. Ogden*, 9 Wheat. 1; *Pickard v. Car Co.*, 117 U. S. 34; *Hardy v. Railroad Co. (Kan.)*, 5 Pac. 6; *Carton v. Railroad Co.*, 59 Iowa, 148; *Louisville & N. R. Co. v. Railroad Commissioners*, 16 Am. & Eng. R. Cas. 1."

Interstate Commerce—Extent of Federal Authority to Regulate.—In *Swift v. Philadelphia & R. R. Co.* (U. S. Cir. Ct., N. D. Ill., Nov. 27, 1893), 58 Fed. Rep. 858, it was held that inasmuch as congress has not adopted the common law of England as the national municipal law, outside of the interstate-commerce act, there is no enactment of congress, and no self-operating provision of the federal constitution which expressly or by implication evidences a command or purpose to interfere with the freedom of interstate commerce, or lay any restraint upon the rights of carriers or shippers engaged therein. *Citing Welton v. State of Missouri*, 91 U. S. 282; *Brown v. Houston*, 114 U. S. 622.

Constitutionality of Act of Feb. 11, 1893, Requiring Witness to Testify or Produce Books and Papers.—In *United States v. James* (U. S. Dist. Ct., N. D. Ill., Feb. 26, 1894), 60 Fed. Rep. 257, it was held that the act of Feb. 11, 1893, which, in effect, provides that no person shall be excused from testifying or producing books, papers, tariffs, contracts, agreements, and documents in any case, in proceedings criminal or otherwise, based upon the interstate commerce act, on the ground that the same may criminate him or subject him to a penalty or forfeiture, but that any person so testifying shall not be prosecuted or subjected to any penalty or forfeiture on account of any transaction, matter, or thing concerning which he may testify, or produce the documentary or other evidence, is violative of the letter and spirit of the fourth and fifth amendments to the constitution of the United States, which provides that the right of the people to be secure in their persons, houses, papers, and books against unreasonable searches and seizures, shall not be violated, and that no person shall be compelled in any criminal case to be a witness against himself.

Construction of Section 5353, U. S. Rev. Stat., Prohibiting Interstate Carriage of Explosives on Passenger Trains—Carriage of Dynamite.—In *United States v. Saul* (U. S. Dist. Ct., W. D. N. Car., Nov. 10, 1893), 58 Fed. Rep. 763, it was held that dynamite, which is made by mixing nitro-glycerine with some solid and inert substance, and which contains no other explosive ingredient, is within section 5353 of the Revised Statutes of the United States, which provides that any person who knowingly transports nitro-glycerine or other enumerated explosives on any vehicle engaged in interstate passenger traffic shall be punished, etc.

Interference with Foreign Commerce—Right of State to Quarantine Emigrants and Travellers.—In *Minneapolis, St. P. & S. S. M. R. Co. v. Milner* (U. S. Cir. Ct., W. D. Mich., N. D., July 29, 1893), 57 Fed. Rep. 276, it was held that the detention and examination of emigrants and travellers and the disinfection of their baggage by state authorities was a valid exercise of the police power, and not an attempt to regulate and prohibit commerce with foreign nations. The court said: "In *Brown v. Maryland*, 13 Wheat. 419-433, Chief Justice MARSHALL recognized that the removal or destruction of infectious or unsound articles was undoubtedly an exercise

of the police power of the state, and an exception to the prohibition resulting from the exclusive power of congress to regulate the operations of foreign and interstate commerce; and that laws of the United States expressly sanction the health laws of the several states. In the License Cases, 5 How. 504, 576, Chief Justice TANEY declared that 'it must be remembered that disease, pestilence, and pauperism are not subjects of commerce, although sometimes among the attendant evils. They are not things to be regulated and trafficked in, but to be prevented as far as human foresight or human means can guard against them.' In *Crutcher v. Kentucky*, 141 U. S. 47, Justice BRADLEY referred to these cases with approval, and stated with great clearness and force the distinction between the exercise of its police power by a state and an attempt to legislate upon matters of interstate or foreign commerce, which are exclusively within the power of the federal government. These authorities render it unnecessary to refer particularly to the cases cited for the complainant. It is sufficient to say that they all relate to state enactments concerning articles of commerce, and hence are not applicable here. Moreover, the quarantine act of congress, approved February 15, 1893, expressly recognizes the validity of state laws, and in section 3 requires the supervising surgeon-general of the marine-hospital service to co-operate with and aid states and municipal boards of health in the execution and enforcement of their rules and regulations."

Transportation of Intoxicating Liquors—Construction of "Wilson Bill" in Connection with Iowa Statute.—In *State v. Rhodes* (Iowa, May 8, 1894), 58 N. W. Rep. 887, it was held that the Wilson bill providing that "all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, shall, upon arrival in such state or territory be subject to the operation of the laws of such state or territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in 'original packages' or otherwise," clearly indicates an intention on the part of congress to make such liquors the subject of state legislation and jurisdiction the moment they cross the boundary of a state and enter therein, and that a carrier who transports it in the original package on a single way-bill from without to its destination within the state is amenable to section 1553 of the code, as amended (McClain's Code, §2410), which provides that if any railway company, etc., shall transport within the state any intoxicating liquors without first having been furnished with a certificate of the auditor of the county to which the liquor is to be transported, certifying that the consignee is authorized to sell such liquor in such county, it, etc., shall, upon conviction thereof, be fined, etc.

The court said: "We do not deem it necessary to enter into an extended consideration as to what is interstate commerce. We think the language of the Wilson bill, when considered with reference to the evil sought to be remedied, clearly indicates an intention on the part of congress to make such liquors the subject of state legislation and jurisdiction the moment they cross the boundaries of Iowa and enter the state. Under the decision in *Leisy's Case*, 135 U. S. 123, such liquors in original packages did not become the subject of state jurisdiction until mingled with the common mass of property therein—until sold. In that case the right of congress to permit the state to exercise jurisdiction over such articles prior to their sale therein was fully recognized. It was for the purpose of removing all impediments to local jurisdiction, as to imported liquors, on their arrival within such jurisdiction, that the Wilson bill was passed. *Wilkerson v. Rahrer*, 11 Sup. Ct. 865.

"By the Wilson bill, these imported liquors, upon arrival within the

state, were subjected to the operation of its laws enacted in the exercise of its police powers, as fully as though such liquors had been produced in such state. Now, if, in this case, the liquor had been produced at a point within the state, and consigned over the Burlington & Western Railway to Brighton, Iowa, there could be no question that our laws would apply thereto; and it is equally clear that upon crossing the border of this state and entering it such imported liquor becomes at once subject to its laws, the same as if produced in the state.

"*In re Spickler*, 43 Fed. 653, the circuit court of the United States, in treating of this matter says: 'The Wilson bill, upon its adoption, made subject to state police laws all imported liquors, as soon as they should pass within the boundary of the state.'

"In the case of *In re Van Vliet*, *Id.* 761, it is said: 'The original package, when it arrives within the state where its transit terminates, is at once reduced to the rank of domestic liquor,—enjoys no privileges not enjoyed by domestic liquor.'

"In *State v. Fraser* (N. D.), 48 N. W. 843, the court said: 'On crossing the boundary line of a state, the supreme authority has declared by this enactment that interstate liquor ceases to be an object of federal protection and control, and becomes mingled with the mass of property within the state, and, in common with all such property, is subject to local police regulations.' If, as appellant contends, imported liquors consigned to a place within this state could be lawfully transported thereto, it is certain that such liquors would not be 'subject to the operation of our laws' to the same extent, and in the same manner, as liquors produced in this state. It seems to us the view that state jurisdiction attaches when the imported liquor enters the state is not only in accord with a reasonable construction of the Wilson bill itself, but in furtherance of the purposes sought to be accomplished by the passage of that act, and finds full support in the authorities."

INTERSTATE COMMERCE COMMISSION

v.

BRIMSON *et al.*

(154 *United States*, 447.)

Constitutionality of Section 12 of the Interstate-commerce Act authorizing Circuit Courts to use their Process in Aid of Inquiries before the Interstate Commerce Commission.—The 12th section of the Interstate-commerce act, in so far as it authorizes the circuit courts of the United States to use their process in aid of inquiries before the commission established by the act, is not unconstitutional because requiring the exercise of the functions of such court in aid of the execution of duties of a judicial nature.

Same—Violation of Personal Rights.—The section is not in derogation of the fundamental guarantees of personal rights recognized by the constitution as inhering in the freedom of the citizen.

Same—Trial by Jury—Due Process of Law.—The section is not unconstitutional because making the failure to respond to the process of the commission punishable by the court as a contempt, without according the right of trial by jury, since the issue as to whether the persons to whom

the process was directed are under the duty to answer the questions propounded to them, or to produce books, papers, and documents is an issue of law, and the question of contempt cannot arise until such issue is determined adversely to such persons, and they refuse to obey the order of the court. Furthermore, in matters of contempt due process of law does not require a jury.

Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON, dissenting.

APPEAL from the United States circuit court for the northern district of Illinois.

Sol. Gen. Maxwell and *George F. Edmunds*, for appellant.

E. Parmalee Prentice, *Chas. S. Holt*, and *J. C. Hutchins*, for appellees.

Mr. Justice HARLAN.—This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the circuit court of the United States on the 15th day of July, 1892, by the interstate commerce commission, under the act of congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev. St. 529, 684, 891.

The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. 476, 480.

The provisions of the interstate-commerce act have no application to the transportation of passengers or property, or to the receiving, delivering, storing, or handling of property wholly within one state, and not shipped to a foreign country from any state or territory, or from a foreign country to any state or territory; but they are declared to be applicable to carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or from any place in the United States

Interstate
commerce act
construed.

to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country, and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States, and carried to such place from a port of entry either in the United States or an adjacent foreign country.

The term "railroad," as used in the act, includes all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" includes all instrumentalities of shipment or carriage.

All charges made for services rendered or to be rendered in the transportation of passengers or property, as above stated, or in connection therewith, or for the receiving, delivering, storing, or handling of such property, are required to be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful. Section 1.

Any carrier subject to the provisions of the act, directly or indirectly, by special rate, rebate, drawback, or other device, charging, demanding, collecting, or receiving from any person or persons a greater or less compensation for services rendered or to be rendered in the transportation of passengers or property than it charges, demands, collects, or receives for doing a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, is to be deemed guilty of unjust discrimination, which the act expressly declares to be unlawful. Section 2.

So it is made unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to any particular description of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular kind of traffic, to undue or unreasonable prejudice or disadvantage in any respect; and carriers subject to the provisions of the act are required to afford, according to their respective powers, all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and not to discriminate in their rates and charges between such connecting lines; but this regula-

tion does not require a carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. Section 3.

It is made unlawful for any carrier subject to the provisions of the act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this does not authorize the charging and receiving as great compensation for a short as for a longer distance. Upon application to the commission, the carrier may, in special cases, after investigation by that body, be authorized to charge less for longer than for short distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which the carrier may be relieved from the operation of this section. Section 4.

It is also made unlawful for any carrier subject to the provisions of the act to enter into any contract, agreement, or combination with any other carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and, in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance is deemed a separate offense. Section 5.

Another section of the act provides for the printing and posting by carriers of their rates, fares, and charges for the transportation of passengers and property, including terminal charges, classifications of freight, and any rules or regulations affecting such rates, fares, and charges, including the rates established and charged for freight received in this country to be carried through a foreign country to any place in the United States; forbids any advance or reduction in such rates, fares, and charges, so established and published, except upon public notice, of which changes the commission shall be notified; requires every carrier to file with the commission copies of all contracts, agreements, or arrangements with other carriers relating to any traffic affected by the provisions of the act, as well as copies of schedules of joint tariffs of rates, fares, or charges for passengers and property over continuous lines or routes operated by more than one carrier; declares it to be unlawful for any carrier, party to any joint tariff, to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection

therewith, between any points as to which a joint rate, fare, or charge is named thereon, than is specified in the schedule filed with the commission in force at the time; authorizes, in addition to the penalties prescribed for neglect or refusal to file or publish rates, fares, and charges, a writ of mandamus to be issued by any circuit court of the United States in the judicial district wherein the principal office of the carrier is situated, or wherein such offense may be committed, and, if such carrier be a foreign corporation, in the judicial circuit wherein it accepts traffic and has an agent to perform such service, to compel compliance with the above provisions of the section relating to schedules of rates, fares, and charges, such writ to issue in the name of the people of the United States, at the relation of the commissioners appointed under the provisions of the act, and the failure to comply with its requirements being punishable as and for a contempt; and empowers the commissioners, as complainants, to apply, in any such circuit court of the United States, for a writ of injunction against the carrier to restrain it from receiving or transporting property among the several states and territories of the United States, or between the United States and adjacent foreign countries, or between ports of transshipment and of entry and the several states and territories of the United States, as mentioned in the first section of the act, until the carrier shall have complied with the provisions last referred to. Section 6.

So a common carrier subject to the provisions of the act is forbidden to enter into any combination, contract, or agreement, expressed or implied, to prevent, by change of time schedule, carriage in different cars, or by other means or devices, the carriage of freights from being continuous from the place of shipment to the place of destination; and no break of bulk, stoppage, or interruption made by such common carrier shall prevent the carriage of freights from being, and being treated, as one continuous carriage from the place of shipment to the place of destination, unless such break, stoppage, or interruption was made in good faith for some necessary purpose, and without any intent to avoid or unnecessarily interrupt such continuous carriage, or to evade any of the provisions of the act. Section 7.

By the eleventh section a commission is created and established, to be known as the "Interstate Commerce Commission," and to be composed of five commissioners, appointed by the president, by and with the advice and consent of the senate. Section 11.

Other sections give a right of action to the persons injured by the acts of carriers done in violation of the statute, pre-

scribe penalties against carriers for illegal exactions and discriminations, and indicate how the provisions of the statute may be enforced against carriers by the commission.

The twelfth section (26 Stat. 743, c. 128), the validity of certain parts of which is involved in this proceeding, provides as follows :

“That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created ; and the commission is hereby authorized and required to execute and enforce the provisions of this act ; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the attorney-general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States ; and for the purposes of this act the commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

“Such attendance of witnesses and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission, or any party to a proceeding before the commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

“And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said commission (and produce books and papers if so ordered) and give evidence touching the matter in question ; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to

criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

"The testimony of any witness may be taken at the instance of a party, in any proceeding or investigation depending before the commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties, nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

"Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

"If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the commission, or agreed upon by the parties by stipulation in writing to be filed with commission. All depositions must be promptly filed with the commission.

"Witnesses whose depositions are taken pursuant to this act, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States." Section 12.

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from

the following summary of the pleadings and orders in the cause :

Prior to the 14th of June, 1892, informal complaint was made to the interstate-commerce commission, under the provisions of the interstate-commerce act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side-tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois, in connection, respectively, with the Baltimore & Ohio Railroad Company, the Baltimore & Southwestern Railroad Company, the Illinois Central Railroad Company, the Lake Shore & Michigan Southern Railway Company, the Chicago, Rock Island & Pacific Railway Company, the Pittsburg, Ft. Wayne & Chicago Railway Company, the Pennsylvania Company, the Pennsylvania Railroad Company, the Belt Railway Company, the Chicago & Alton Railroad Company, the Chicago Railway Transfer Company, the Atchison, Topeka & Santa Fé Railway Company, the Elgin, Joliet & Eastern Railway Company, the Chicago & Northwestern Railway Company, and the Chicago, Milwaukee & St. Paul Railway Company; that it had also caused to be incorporated under the laws of Wisconsin, for the purpose of operating its switches and side-tracks at or near Milwaukee, in that state, and engaging in traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, in connection with the Chicago, Milwaukee & St. Paul Railway Company and the Chicago & Northwestern Railway Company; and that said Illinois Steel Company owned and controlled the above-named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the act to regulate commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give to the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named, "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies so controlled, and operated had filed with the commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges, as required by the act of congress.

The commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated, to file with the commission the above contracts, agreements, and tariffs.

An order was thereupon made by the commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington a full, complete, perfect, and specific, verified answer, setting forth all the facts in regard to the matters complained of, and responding to the following questions:

"(1) Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

"(2) Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they, and what are the divisions thereof between the several carriers?

"(3) Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company, and if so, to what amount?"

The order further required all of the companies named to appear before the commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. The Calumet & Blue Island Railway Company also denied that the operation of its railways was a device to evade the provision of the interstate-commerce act, or had resulted in obtaining for the Illinois Steel Company special, illegal, unjust, or unreasonable rates in interstate traffic, or in securing to that company illegal, undue, or unreasonable preferences.

The commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpoenaed to testify before the commission was William J. Brimson, the president and manager of the five roads so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching—switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them. Mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies, with which they had traffic arrangements, he was asked

whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question.

J. S. Keefe, secretary and auditor of the five roads mentioned, was examined by the commission as a witness. He admitted that he had in his possession a book showing the names of the stockholders of the Calumet & Blue Island Railway Company, but refused, upon the demand of the commission, to produce it. He also refused to answer the question, "Do you know, as a matter of fact, whether the Illinois Steel Company owns the greater part of the stock of these several railroads?"

William R. Sterling, first vice-president of the Illinois Steel Company, was also examined as a witness, and, after stating that that company had a contract with the five railroads in question to handle the railroad business at the five "plants" of the steel company, refused to answer the question, "Is that the only relation which your company sustains to these railroad companies?"

On the succeeding day the commission issued a subpoena *duces tecum*, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock-books of those companies. A like subpoena was issued to William R. Sterling, as first vice-president of the steel company, commanding him to appear before the commission and produce the stock-books of that company. Keefe and Sterling appeared in answer to the subpoenas, but refused to produce the books, or either of them, so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition, embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Sterling to appear before that body and answer the several questions propounded by them, and which they had respectively refused to answer, and requiring Keefe and Sterling to appear and produce before the commission the stock-books above referred to as in their possession.

The answers of Brimson, Keefe, and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the interstate-commerce act as empowered the commission to require the attendance and testimony of witnesses, and the production of books, papers, and documents, and authorizes the circuit court of the United States to order common carriers or per-

sons to appear before the commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress (25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the constitution. The circuit court, as we have seen, regarded the petition of the interstate commerce commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." *In re Interstate Commerce Commission*, 53 Fed. Rep. 476, 480.

In other words, if the interstate-commerce act made the refusal of a witness duly summoned to appear and testify before the commission, in respect to a matter rightfully committed by congress to that body for examination, an offense against

the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of congress, in the name of the commission, and under the direction of the attorney-general of the United States, against the witness so refusing to testify, to compel him to give evidence before the commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by congress to receive the judicial power of the United States.

This interpretation of the constitution would restrict the employment of means to carry into effect powers granted to congress within much narrower limits than, in our judgment, are warranted by that instrument.

The constitution expressly confers upon congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes, and to make all laws necessary and proper for carrying that power into execution. Article 1, § 8. While the completely internal commerce of a state is reserved to the state itself, because never surrendered to the general government, commerce, the regulation of which is committed by the constitution to congress, comprehends traffic, navigation, and every species of commercial intercourse or trade between the United States, among the several states, and with the Indian tribes. *Gibbons v. Ogden*, 9 Wheat. 1, 193, 194. "It may be doubted," this court has said, "whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficiency would tend to defeat an object, in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." *Brown v. Maryland*, 12 Wheat. 419, 446; *Philadelphia & S. S. S. Co. v. Pennsylvania*, 122 U. S. 326, 346, 18 Am. & Eng. Corp. Cas. 1. "In the matter of interstate commerce," this court, speaking by Mr. Justice BRADLEY, has declared, "the United States are but one country, and are and must be subject to one system of regulations, and not to a multitude of systems." *Robbins v. Taxing Dist.*, 120 U. S. 489, 494, 16 Am. & Eng. Corp. Cas. 1.

The same principle was announced by the present chief justice in *Stoutenburgh v. Hennick*, 129 U. S. 141, 148.

What is the nature of the power thus expressly given to congress, and to what extent and under what restrictions may it be constitutionally exerted?

This question was answered when Chief Justice MARSHALL said that it was the power "to prescribe the rule by which commerce was to be governed." "The power," the "chief justice continued, "like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several states is vested in congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of congress, their identity with the people, and the influence which their constituents possess at elections are, in this as in many other instances,—as that, for example, of declaring war,—the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments." *Gibbons v. Ogden*, 9 Wheat. 1, 189, 196, 197.

Congress thus having plenary power subject to the limitations imposed by the constitution to prescribe the rule by which commerce among the several states is to be governed, the question necessarily arises, What are the principles that should control the judiciary when determining whether a particular act of congress, avowedly adopted in execution of that power, is consistent with the fundamental limitations of the constitution?

The general principle applicable to this subject was long ago announced by this court, and has been so often affirmed and applied that argument in support of it is unnecessary, even if it were possible to suggest any thought not heretofore expressed in the adjudged cases. In the great case of *McCulloch v. Maryland*, 4 Wheat. 316, 421, 423, it was said: "The sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end

be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional." Again : " Where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This court disclaims all pretensions to such a power."

Guided by these principles, we proceed to inquire whether the twelfth section of the interstate-commerce act, so far as it authorizes the present proceedings, assumes to invest the circuit courts of the United States with functions that are not judicial.

It was not disputed at the bar, nor indeed can it be successfully denied, that the prohibition of unjust charges, discriminations, or preferences, by carriers engaged in interstate commerce, in respect to property or persons transported from one state to another, is a proper regulation of interstate commerce, or that the object that congress has in view by the act in question, may be legitimately accomplished by it under the power to regulate commerce among the several states. In every substantial sense such prohibition is a rule by which interstate commerce must be governed, and is plainly adapted to the object intended to be accomplished. The same observation may be made in respect to those provisions empowering the commission to inquire into the management of the business of carriers subject to the provisions of the act, and to investigate the whole subject of interstate commerce as conducted by such carriers, and, in that way to obtain full and accurate information of all matters involved in the enforcement of the act of congress. It was clearly competent for congress, to that end, to invest the commission with authority to require the attendance and testimony of witnesses, and the production of books, papers, tariffs, contracts, agreements, and documents relating to any matter legally committed to that body for investigation. We do not understand that any of these propositions are disputed in this case.

Interpreting the interstate-commerce act as applicable, and as intended to apply, only to matters involved in the regulation of commerce, and which congress may rightfully subject to investigation by a commission established for the purpose of enforcing that act, we are unable to say that its provisions are not appropriate and plainly adapted to the protection of interstate commerce from burdens that are or may be directly and indirectly, imposed upon it by means of unjust and un-

reasonable discriminations, charges, and preferences. Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of objects within the scope of the powers granted to it. It is a settled principle of constitutional law that "the government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception." 4 Wheat. 316, 409. The test of the power of congress is not the judgment of the courts that particular means are not the best that could have been employed to effect the end contemplated by the legislative department. The judiciary can only inquire whether the means devised in the execution of a power granted are forbidden by the constitution. It cannot go beyond that inquiry without entrenching upon the domain of another department of the government. That it may not do with safety to our institutions. Sinking Fund Cases, 99 U. S. 700, 718.

An adjudication that congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce, be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules.

It is to be observed that, independently of any question concerning the nature of the matter under investigation by the commission,—however legitimate or however vital to the public interest the inquiry being conducted by that body,—the judgment below rests upon the broad ground that no direct proceeding to compel the attendance of a witness before the commission, or to require him to answer questions put to him, or to compel the production of books, documents, or papers in his possession relating to the subject under ex-

amination, can be deemed a case of controversy of which, under the constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial; and the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although, by the established doctrine of the courts, a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because, and only because, its road is a public highway, established primarily for the convenience of the people and to subserve public objects, and therefore subject to governmental control. *Cherokee Nation v. Southern Kan. R. Co.*, 135 U. S. 641, 657, 44 Am. & Eng. R. Cas. 26.

What is a case or controversy to which, under the constitution, the judicial power of the United States extends? Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice MARSHALL, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States." *Osborn v. Bank*, 9 Wheat. 738, 819. And in *Den ex dem. Murray v. Improvement Co.*, 18 How. 272, 284, Mr. Justice CURTIS, after observing that congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in *Smith v. Adams*, 130 U. S. 173, Mr. Justice FIELD, speaking for the court, said that the terms "cases" and "controversies," in the constitution, embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforce-

ment of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an act of congress authorizing the interstate commerce commission to summon witnesses, and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed, in conformity with the constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the commission imposes upon any one summoned by that body to appear and to testify the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument would be of no value in the discussion. Whether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement; and those issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an act of congress declaring it to be an offense against the United States for any one to refuse to testify before the commission after being duly summoned, or to

produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to rightful orders of the commission, while it was exerting the powers given to it by congress; and such is the sole object of the present direct proceeding. The United States asserts its right under the constitution and laws, to have these appellees answer the questions propounded to them by the commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the interstate-commerce act, to do what is required of them by the commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute.

As the circuit court is competent, under the law by which it was ordained and established, to take jurisdiction of the parties, and as a case arises under the constitution or laws of the United States when its decision depends upon either, why is not this proceeding, judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the constitution? It must be so regarded, unless, as is contended, congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the commission, except through criminal prosecutions or by civil actions to recover penalties imposed for noncompliance with such orders. But no limitation of that kind upon the power of congress to regulate commerce among the states is justified either by the letter or the spirit of the constitution. Any such rule of constitutional interpretation, if applied to all the grants of power made to congress, would defeat the principal objects for which

the constitution was ordained. As the issues are so presented that the judicial power is capable of acting on them finally as between the parties before the court, we cannot adjudge that the mode prescribed for enforcing the lawful orders of the interstate commission is not calculated to attain the object for which congress was given power to regulate interstate commerce. It cannot be so declared unless the incompatibility between the constitution and the act of congress is clear and strong. *Fletcher v. Peck*, 6 Cranch, 87, 128. In accomplishing the objects of a power granted to it, congress may employ any one or all the modes that are appropriate to the end in view, taking care only that no mode employed is inconsistent with the limitations of the constitution.

We do not overlook those constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of congress. Neither branch of the legislative department, still less any merely administrative body, established by congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. *Kilbourn v. Thompson*, 103 U. S. 168, 190. We said in *Boyd v. U. S.*, 116 U. S. 616; 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the government and its employés of the sanctity of a man's home and the privacies of his life. As said by Mr. Justice FIELD in *Re Pacific Ry. Commission*, 32 Fed. Rep. 241, 250, "of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves, not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others. Without the enjoyment of this right, all others would lose half their value."

It was said in argument that the twelfth section was in derogation of those fundamental guaranties of personal rights that are recognized by the constitution as inhering in the freedom of the citizen. It is scarcely necessary to say that the power given to congress to regulate interstate commerce does not carry with it any power to destroy or impair those guaranties. This court has already spoken fully upon that general subject in *Counselman v. Hitchcock*, 142, U. S. 547. We need not add anything to what has been there said. Suffice it in the present case to say that as the interstate commerce commission, by petition in a circuit court of the United States, seeks, upon grounds distinctly set forth, an order to compel appellees to answer

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rights.

particular questions and to produce certain books, papers, etc., in their possession, it was open to each of them to contend before that court that he was protected by the constitution from making answer to the questions propounded to him, or that he was not legally bound to produce the books, papers, etc., ordered to be produced, or that neither the questions propounded nor the books, papers, etc., called for relate to the particular matter under investigation, nor to any matter which the commission is entitled under the constitution or laws to investigate. These issues being determined in their favor by the court below, the petition of the commission could have been dismissed upon its merits.

It may be proper to state in this connection that, after the decision in *Counselman v. Hitchcock*, the interstate-commerce act was amended by an act approved February 11, 1893, which provides "that no person shall be excused from attending and testifying, or from producing books, papers, tariffs, contracts, agreements, and documents before the interstate commerce commission, or in obedience to the subpoena of the commission, whether such subpoena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of congress, entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before said commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: Provided, that no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense, and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year, or by both such fine and imprisonment." 27 Stat. 443, c. 83. But that act was not in force when this case was determined below; nor does it reach the question whether a proceeding like the

present one can be maintained in a circuit court of the United States.

In the course of the argument at the bar, our attention was called to Hayburn's Case, 2 Dall. 409, and U. S. v. Ferreira, 13 How. 40, 46, as announcing principles not in harmony with the views we have expressed in this opinion.

Hayburn's Case was an application for a mandamus to be directed to the circuit court of the United States for the district of Pennsylvania, commanding that court to proceed in a petition by Hayburn to be put on the pension-list of the United States, in conformity with an act of congress approved March 23, 1792 (chapter 11), which provided for the settlement of the claims of widows and orphans barred by limitations previously established, and to regulate claims to invalid pensions. This court took the case under advisement, but, as congress provided in another way for the relief of invalid pensioners, no decision was made. Nevertheless, by a note to Hayburn's Case, we are informed of the views expressed at the circuit by different members of this court in relation to the act of 1792. They concurred in holding that it was not in the power of congress to assign to the courts of the United States any duties except such as were properly judicial, and to be performed in a judicial manner; and that the duties assigned to the circuit courts were not of that description, and were not contemplated by the act of congress as of that character; and, consequently, that the act could be considered as only appointing commissioners for the purposes mentioned in it by official instead of personal descriptions, which positions the judges of the court were at liberty to accept or decline.

In a note prepared by Chief Justice TANEY, under the direction of this court, and found in 13 How. 52, an account is given of Todd's Case, which also involved the validity of the act of 1792, so far as it imposed upon the circuit courts duties relating to pensions, and it is there stated that Chief Justice JAY and Justice CUSHING, upon further reflection, became satisfied that the power conferred by the act of 1792 on the circuit court as a court could not be construed as giving such power to the judges of the court as commissioners.

The same general principles were announced in Ferreira's Case, which arose under the treaty of 1819, between Spain and the United States, and under certain acts of congress passed to carry a particular article of that treaty into execution. The case came before this court upon appeal from a decision or award made by the district judge, acting upon a special statute authorizing him to receive and adjudicate certain claims. A motion to dismiss the appeal for want

of jurisdiction in this court raised the question whether the district judge exercised judicial power, strictly speaking, under the constitution. The motion to dismiss was sustained. Chief Justice TANEY, referring to the statutes under which the district judge proceeded, said: "It is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function to be exercised in the ordinary forms of a court of justice; for there is to be no suit, no 'parties,' in the legal acceptance of the term, are to be made, no process to issue, and no one is authorized to appear in behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*, and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award are to be filed in the court in which he presides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided to the secretary of the treasury, and the claim is to be paid if the secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the secretary, but not upon that of the judge. It is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges and their respective jurisdictions are referred to in the law merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commission." 13 How. 40, 46, 47.

It thus appears that the act of 1792, above referred to, attempted to impose upon the courts of the United States duties purely administrative in their character. So, also, the acts of congress involved in Ferreira's Case conferred no authority upon the district judge to determine finally any questions of a judicial nature, and without requiring any petition to be filed, and without empowering the district attorney to enter an appearance for the United States, so as to make it a party to the proceeding, or to authorize a judgment against it, gave that officer the power only of adjusting, without the presence of parties, certain claims, the allowance and payment of which, after being so adjusted, were made to depend wholly upon the discretion of the secretary of the treasury.

Some allusion should be made in this connection to *Gordon v. U. S.*, 117 U. S. 697, and *In re Sanborn*, 148 U. S. 222.

In *Gordon's Case* the question was whether this court had jurisdiction to review the action of the court of claims in respect to a claim examined and allowed in the latter court under an act of congress (12 Stat. 765, c. 92, §§ 5, 7, 14), which, among other things, provided that no money should be paid out of the treasury for any claim passed upon by the court of claims until after an appropriation therefor should be estimated by the secretary of the treasury, and an appropriation to pay it be made by congress. Under that act, neither the court of claims nor this court could do anything more than certify their opinion to the secretary of the treasury, and it depended upon that officer, in the first place, to decide whether he would include it in his estimates of private claims; and, if he decided in favor of the claimant, it rested with congress to determine whether it would or would not make an appropriation for its payment. Neither the court of claims nor this court could, by any process, enforce its judgment; and whether the claim was paid or not did not depend on the decision of either court, but upon the future action of the secretary of the treasury and of congress.

The appeal of *Gordon* was dismissed, upon the ground that congress could not "authorize or require this court to express an opinion on a case where its judicial power could not be exercised, and where its judgment would not be final and conclusive upon the rights of the parties, and process of execution awarded to carry it into effect." "The award of execution," said Chief Justice TANEY, "is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no 'judgment,' in the legal sense of the term, without it. Without such an award the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion which would remain a dead letter, and without any operation upon the rights of the parties, unless congress should at some future time sanction it and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of congress." 117 U. S. 702. See *De Groot v. U. S.*, 5 Wall. 419.

In *Sanborn's case*, above cited, the same principles were announced. That case arose under an act of congress of March 3, 1887 (24 Stat. 505, c. 359), one section of which provided that, "when any claim or matter may be pending in any of the executive departments which involves controverted

questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted." Section 12. This court dismissed an appeal from a finding of the court of claims, under this act. Referring to the cases of Hayburn, Todd, Ferreira, and Gordon, above cited, it observed: "Such a finding is not made obligatory on the department to which it is reported; certainly not so in terms, and not so, as we think, by any necessary implication. We regard the function of the court of claims, in such a case, as ancillary and advisory only. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made by the statute the final and indisputable basis of action either by the department or by congress." Page 226, 148 U. S.

The views we have expressed in the present case are not inconsistent with anything said or decided in those cases. They do not in any manner infringe upon the salutary doctrine that congress, excluding the special cases provided for in the constitution,—as, for instance, in section 2, of article 2 of that instrument,—may not impose upon the courts of the United States any duties not strictly judicial. The duties assigned to the circuit courts of the United States by the twelfth section of the interstate-commerce act are judicial in their nature. The inquiry whether a witness before the commission is bound to answer a particular question propounded to him, or to produce books, papers, etc., in his possession, and called for by that body, is one that cannot be committed to a subordinate administrative, or executive tribunal for final determination. Such a body could not, under our system of government, and consistently with due process of law, be invested with authority to compel obedience to its orders by a judgment of fine or imprisonment. Except in the particular instances enumerated in the constitution, and considered in *Anderson v. Dunn*, 6 Wheat. 204, and in *Kilbourn v. Thompson*, 103 U. S. 168, 190, of the exercise by either house of congress of its right to punish disorderly behavior upon the part of its members, and to compel the attendance of witnesses and the production of papers in election and impeachment cases, and in cases that may involve the existence of those bodies, the power to impose fine or imprisonment in order to compel the performance of a legal duty imposed by the United States can only be exerted, under the law of the

land, by a competent judicial tribunal having jurisdiction in the premises. See *Whitcomb's Case*, 120 Mass. 118, and authorities there cited.

Without the aid of judicial process of some kind, the regulations that congress may establish in respect to interstate commerce cannot be adequately or efficiently enforced. One mode, as already suggested (the validity of which is not questioned), of compelling a witness to testify before the interstate commerce commission to answer questions propounded to him relating to the matter under investigation, and which the law makes it his duty to answer, and to produce books, papers, etc., is to make his refusal to appear and answer, or to produce the documentary evidence called for, an offense against the United States, punishable by fine or imprisonment. A criminal prosecution of the witness under such a statute, it is conceded, would be a case or controversy, within the meaning of the constitution, of which a court of the United States could take jurisdiction. Another mode would be to proceed by information to recover any penalty imposed by the statute. A proceeding of that character, it is also conceded, would be a case or controversy of which a court of the United States could take cognizance. If, however, congress, in its wisdom, authorizes the commission to bring before a court of the United States for determination the issues between it and a witness, that mode of enforcing the act of congress, and of compelling the witness to perform his duty, is said not to be judicial, and is beyond the power of congress to prescribe.

We cannot assent to any view of the constitution that concedes the power of congress to accomplish a named result indirectly, by particular forms of judicial procedure, but denies its power to accomplish the same result directly, and by a different proceeding judicial in form. We could not do so without denying to congress the broad discretion with which it is invested by the constitution of employing all or any of the means that are appropriate or plainly adapted to an end which it has unquestioned power to accomplish; namely, the protection of interstate commerce against improper burdens and discriminations. Indeed, of all the modes that could be constitutionally prescribed for the enforcement of the regulations embodied in the interstate-commerce act, that provided by the twelfth section is the one which, more than any other, will protect the public against the devices of those who, taking advantage of special circumstances, or by means of combinations too powerful to be resisted and overcome by individual effort, would subject commerce among the states to unjust and unreasonable burdens.

The present proceeding is not merely ancillary and advisory. It is not, as in *Gordon's Case*, one in which the United States seeks from the circuit court of the United States an opinion that "would remain a dead letter, and without any operation upon the rights of the parties." The proceeding is one for determining rights arising out of specified matters in dispute that concern both the general public and the individual defendants. It is one in which a judgment may be rendered that will be conclusive upon the parties until reversed by this court, and that judgment may be enforced by the process of the circuit court. Is it not clear that there are here parties on each side of a dispute involving grave questions of legal rights, that their respective positions are defined by pleadings, and that the customary forms of judicial procedure have been pursued? The performance of the duty which, according to the contention of the government, rests upon the defendants, cannot be directly enforced except by judicial process. One of the functions of a court is to compel a party to perform a duty which the law requires at his hands. If it be adjudged that the defendants are, in law, obliged to do what they have refused to do, that determination will not be merely ancillary and advisory, but, in the words of *Sanborn's Case*, will be a "final and indisputable basis of action," as between the commission and the defendants, and will furnish a precedent in all similar cases. It will be as much a judgment that may be carried into effect by judicial process as one for money, or for the recovery of property, or a judgment in mandamus commanding the performance of an act or duty which the law requires to be performed, or a judgment prohibiting the doing of something which the law will not sanction. It is none the less the judgment of a judicial tribunal dealing with questions judicial in their nature, and presented in the customary forms of judicial proceedings because its effect may be to aid an administrative or executive body in the performance of duty legally imposed upon it by congress in execution of a power granted by the constitution.

This view is illustrated by the case of *Fong Yue Ting v. U. S.* 149, U. S. 698, 728, which arose under the act of May 5, 1892 (chapter 60), prohibiting the coming of Chinese persons into the United States. That act provided for the arrest and removal from the United States of any person of Chinese descent unlawfully within this country, unless such person shall establish, by affirmative proof, to the satisfaction of a justice, judge, or commissioner of the United States before whom he might be brought and tried, his lawful right to remain in the United States. It also authorized the arrest of such person by any customs official, collector of internal revenue, or United States

marshal, and taken before a United States judge. This court said: "When, in the form prescribed by law, the executive officer, acting in behalf of the United States, brings the Chinese laborer before the judge, in order that he may be heard, and the facts upon which depends his right to remain in the country be decided, a case is duly submitted to the judicial power; for here are all the elements of a civil case,—a complainant, defendant, and a judge; actor, *reus*, *et judex*. 3 Bl. Comm. 25; *Osborn v. Bank*, 9 Wheat. 738, 819. No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge or the validity of the statute."

Another suggestion thrown out in argument against the validity of the twelfth section of the interstate-commerce act, in the particular adverted to, is that the defendants are not accorded a right of trial by jury. If, as we have endeavored to show, this proceeding makes a case of controversy within the judicial power of the United States, the issue whether the defendants are under a duty to answer the questions propounded to them, and to produce the books, papers, documents, etc., called for, is manifestly not one for the determination of a jury. The issue presented is not one of fact, but of law exclusively. In such a case the defendant is no more entitled to a jury than is a defendant in a proceeding by mandamus to compel him, as an officer, to perform a ministerial duty. Of course, the question of punishing the defendants for contempt could not arise before the commissioner; for, in a judicial sense, there is no such thing as contempt of a subordinate administrative body. No question of contempt could arise until the issue of law, in the circuit court, is determined adversely to the defendants, and they refuse to obey, not the order of the commission, but the final order of the court; and, in matters of contempt, a jury is not required by "due process of law." From the very nature of their institution, and that their lawful judgments may be respected and enforced, the courts of the United States possess the power to punish for contempt; and this inherent power is recognized and enforced by a statute expressly authorizing such courts to punish contempts of their authority when manifested by disobedience of their lawful writs, process, orders, rules, decrees, or commands. Rev. St. § 725; 1 Stat. 83; 4 Stat. 487; *U. S. v. Hudson*, 7 Cranch 32; *Anderson v. Dunn*, 6 Wheat. 204, 227; *Ex parte Robinson*, 19 Wall. 505, 510; *Ex parte Terry*, 128 U. S. 289, 302, 303; *Cartwright's Case*, 114 Mass. 230, 238. Surely, it cannot be supposed that the question of contempt of the authority of a court of the United States, committed by a disobedience of its orders, is triable, of right, by a jury.

Trial by jury
—Due process
of law.

We are of opinion that a judgment of the circuit court of the United States determining the issues presented by the petition of the interstate commerce commission and by the answers of the appellees will be a legitimate exertion of judicial authority in a case or controversy to which, by the constitution, the judicial power of the United States extends. A final order by that court dismissing the petition of the commission, or requiring the appellees to answer the questions propounded to them, and to produce the books, papers, etc., called for, will be a determination of questions upon which a court of the United States is capable of acting, and which may be enforced by judicial process. If there is any legal reasons why appellees should not be required to answer the questions put to them, or to produce the books, papers, etc., demanded of them, their rights can be recognized and enforced by the court below when it enters upon the consideration of the merits of the questions presented by the petition.

In view of the conclusion reached upon the only question determined by the circuit court, what judgment shall be here entered? The case was heard below upon the petition of the commission and the answers of the defendants. But no ruling was made in respect to the materiality of the evidence sought to be obtained from the defendants. Passing by every other question in the case, the circuit court, by its judgment, struck down so much of the twelfth section as authorized or required the courts to use their process in aid of the inquiries before the commission. Under the circumstances, we do not feel obliged to go further at this time than to adjudge, as we now do, that that section, in the particular named, is constitutional, and to remand the cause, that the court below may proceed with it upon the merits of the questions presented by the petition and the answers of the defendants, and make such determination thereof as may be consistent with law. Any other course would, it might be apprehended, involve the exercise of original jurisdiction, and might possibly work injustice to one or the other of the parties.

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

Reversed.

Mr. Justice FIELD was not present at the argument, and took no part in the consideration or decision of this case. Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON dissented.

Constitutionality of Section 12 of the Interstate-commerce Act.—See *In re Interstate Commerce Commission* (C. C.), 58 Am. & Eng. R. Cas.1, and note, 7.

INTERSTATE COMMERCE COMMISSION

v.

TEXAS PACIFIC R. CO.

(*United States Circuit Court of Appeals, 2d Circuit, October 17, 1893. 57 Fed. Rep. 948.*)

Illegal Discrimination in Freight Charges on Domestic and Imported Goods—Interstate Commerce.—Rates established by a railroad company whereby certain imported goods are transported for 80 cents per 100 pounds, and the charges for the transportations of the same class of domestic goods are from \$2 to \$3 more per 100 pounds, is a violation of the interstate-commerce act, which prohibits (in section 2) unjust discrimination in compensation charged for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and also prohibits (in section 3) any undue or unreasonable preference or advantage to any particular description of traffic.

Same—Dissimilar Conditions Created by Ocean Competition.—Although ocean competition creates a dissimilar condition within the meaning of the act, yet that condition will not justify the difference in the rates charged.

Same—Dissimilar Conditions—Right of Carrier to fix Rates Arbitrarily.—While dissimilar conditions justify dissimilarity in rates, remote dissimilarities of condition do not justify any dissimilar rate which the carrier may choose to make.

Domicile and Principal Office of Corporation.—Where the charter of a railroad company fails to state the location of its principal office, and, in fact, the meetings of its stockholders and directors are held in one state wherein the records of such meetings and the stock-certificate books are kept, and wherein the offices of its president, first vice-president, secretary, and treasurer are located, its domicile and principal office is within such state, although the general or administrative offices of the heads of departments are within another state within which the road is operated.

Disobedience by more than one Company of Order of Interstate Commerce Commission—Power to Enforce Order against one Company within the Jurisdiction.—Proceedings before the court to compel obedience to an order of the interstate commerce commission will not be rendered impossible because of the inability of the court to obtain jurisdiction over all the companies which have disobeyed the order by uniting in making prohibited-rate charges, and because that the principal offices of one of the offenders is not within the state, but if the proceeding is to enforce an order already made after hearing all the parties in interest, the presence of all of them is not necessary or indispensable to its enforcement against the one within the jurisdiction.

APPEAL from the United States circuit court for the south-district of New York.

Winslow S. Pierce and David B. Duncan, for appellant.

John D. Kernan and *Edward Mitchell*, U. S. Dist. Att'y, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge.—On March 23, 1889, the interstate commerce commission made, not upon contention of parties, a general order, which, among other things, provided as follows: "Imported traffic transported to any place in the United States from a port of entry, or place of reception, whether in this country or in an adjacent foreign country, is required to be taken on the inland tariff governing other freights."

This order was quite generally obeyed by those railroad companies and their connecting lines which carried imported goods westward from the northern Atlantic seaboard. At least six railroad companies ceased, after said order, their previous practice of discrimination in favor of im-ported traffic. On June 19, 1889, the commission Case stated. filed its decision in regard to export rates in the case of *New York Produce Exchange v. New York Cent. & H. R. R. Co.*, 3 Inter St. Commerce Com. R. 137. The opinion shows that the "trunk lines," so called, had, "under resolutions of their association, made through export rates, of which the inland proportion accepted by them was, at the port of New York, often ten cents or more per hundred pounds less on like traffic than the published tariff rates charged at the same time to the same port." It was held "that the discrepancy between the proportion of the through rate accepted and the established tariffs for seaboard consignments for the same inland carriage is not shown to have been justified by any circumstances tending to show that it was just or proper, and that it must therefore be deemed an unjust and unlawful discrimination as against the transportation terminating at that port," and that "the only practicable mode yet devised for making through export rates, as appears by past experience, is to add to these established inland rates from the interior to the seaboard the current ocean rates." This decision was confined to export rates at the port of New York, but, as thus made, was of almost national importance. It is believed that the railroad companies which were parties to the litigation complied with the order of the commission.

In this state of the general railroad policy which had been established by the commission in regard to rates which discriminated in favor of either import or export traffic against inland traffic, the New York Board of Trade and Transportation filed before the interstate commerce commission, on November 29, 1889, a complaint against the Pennsylvania Railroad Company and its connecting western railroad com-

panies, charging, in substance, that these corporations were, in violation of the act to regulate commerce, guilty of unjust discrimination, in that, for the transportation of property to Chicago and other western points, which was delivered to them at New York or Philadelphia by vessels or steamship lines from foreign ports, under through bills of lading, they were charging rates 50 per cent lower than for the like and contemporaneous service rendered to property delivered at New York or Philadelphia which did not arrive from foreign ports. Subsequently, the San Francisco Chamber of Commerce became a party complainant, and divers other railroad companies, among them the Texas & Pacific and the Southern Pacific Railroad companies, were made parties defendant, until 28 companies were defendants. This complaint was apparently brought to compel universal obedience to the order of March, 1889. The commission dismissed the complaint as to 18 defendants and found that its averments were true as to 10 defendants, among which were the Texas & Pacific and the Southern Pacific companies, and as to said defendants ordered, on January 29, 1891, that each of them, on and after May 5, 1891, cease from carrying any article of import traffic shipped from any foreign port through any port of entry of the United States, or any port of entry in a foreign country adjacent to the United States, upon through bills of lading, and destined to any place within the United States, upon any other than the published inland tariff covering the transportation of other freight of like kind over their respective lines from such port of entry to such place of destination, which order was duly served upon the Texas & Pacific Railroad Company.

On or about January 18, 1892, the commission brought its petition against said company before the circuit court for the southern district of New York, alleging that it had wilfully violated said order by charging, collecting, and receiving freight rates which had been declared to be illegal, and by way of specification the petition alleged that the offending and also the regular inland rates were shown in a table annexed to the petition, marked "Exhibit 36." The findings of fact by the commission upon the original complaint were made part of the petition. The prayer of the petition was for an injunction against further disobedience of the order. The defendant's answer denied that its principal office was in the state of New York. It denied no other allegations of fact, but denied that the order was a lawful order. It stated that the rates which were complained of were, so far as they were made for inland carriage, the joint rates over its railway and the Southern Pacific Railway, and cover the carriage by the

rails of the defendant from New Orleans to El Paso, Tex., and by the rails of the Southern Pacific road from El Paso to San Francisco. The answer admitted that it charges, demands, collects, and receives, and has since the date of the order charged, demanded, collected, and received, rates for the transportation of commodities from Liverpool and London via New Orleans and said two railways to San Francisco, and also from New Orleans via the same route to the same destination, substantially as stated in Exhibit 36. Its reasons for a discrimination in inland rates between foreign and domestic merchandise will be stated hereafter. The answer further said that the order affected its rates from London, Liverpool, and other European points to Missouri River points, but that these rates became so low that it had canceled its tariff, and was charging on such business as it received, destined from Europe to the Missouri river, the local rates from New Orleans. The answer further stated that the order also affected its rates of transportation on articles from Europe to towns in Texas and Colorado. No testimony was taken before the circuit court. The case was heard upon petition and answer, and an injunction was directed against the defendant in accordance with the prayer of the petition. From this decree the defendant has appealed to this court.

Exhibit 36 shows a very marked discrimination in rates from New Orleans to San Francisco between those charged upon merchandise shipped by through bills of lading from Liverpool to San Francisco and those charged upon the same kind of goods delivered to the defendant at New Orleans from places in this country for transportation to San Francisco. For example, the through rates from Liverpool to San Francisco, per 100 pounds, on books, shoes, carpets, cashmeres, cutlery, and woolen goods were \$1.07, of which the railroads received for carriage from New Orleans to San Francisco 80 cents; while upon the same classes of goods received from points in this country at New Orleans the rates for carriage from New Orleans to San Francisco, per 100 pounds, were as follows: Upon books and carpets, \$2.88; upon shoes, cashmeres, cutlery, and woolen goods, \$3.70. The finding of facts by the commission shows that in 1889 the importations of the Texas & Pacific Railway were about 5,000,000 pounds, of which about \$2,500,000 pounds went to Missouri-river points, about 2,000,000 pounds to the Pacific slope, California terminals, and Oregon points, and the remainder was distributed mostly in Colorado and Utah, while a little of it went to Texas. As the defendant is charged with a violation of the order only with respect to its rates to California terminals, it is necessary to state no other facts than those which related

to that part of its business. The through rates from Liverpool to San Francisco are controlled by the competition at Liverpool and London of steamships connecting with railroads across the Isthmus of Panama, and in a small degree, with respect to cheap heavy goods, of sailing vessels around Cape Horn. The defendant carries import traffic at the reduced rate to California terminals only. To intermediate points the regular inland rates are charged. This traffic is taken at the reduced rate because, unless so taken, the defendant would, by reason of the competition, lose the business which it is expected will increase. The defendant places the dissimilarity of conditions between the transportation of domestic and imported goods solely upon this ocean competition. There is apparently no other reason why the inland rates should not be applied to all business, both domestic and foreign. No finding was made as to the profit upon the San Francisco business. There was a profit, when the case was heard before the commission, upon the Missouri-river business. It was found that the Southern Pacific proportion of the through rate would not, in the absence of competition, be a full and fair return for the transportation service rendered. It gave the road something more than the actual cost of the movement of the freight.

The commission contended that upon these facts the defendant had violated the second section of the act to regulate commerce, which prohibits unjust discrimination in the compensation charged for like and contemporaneous services in the transportation of a like kind of traffic under substantially similar circumstances and conditions, and had also violated the third section, which prohibits any undue or unreasonable preference or advantage to any particular description of traffic. The defendant insisted that the dissimilar conditions growing out of the ocean competition freed its conduct from the prohibition of the statute. The commission was of opinion that this class of dissimilar conditions was not in the contemplation of the statute, and was not to be regarded in the regulation of inland tariffs of rates. Its language was as follows: "These circumstances and conditions are indeed widely different in many respects from the circumstances and conditions surrounding the carriage of domestic interstate traffic between the states of the American Union by rail carriers; but, as the regulation provided for by the act to regulate commerce does not undertake to regulate or govern them, they cannot be held to constitute reasons in themselves why imported freight brought to a port of entry of the United States, or a port of entry of an adjacent foreign country destined to a place within the United States, should be carried

at a lower rate than domestic traffic from such ports of entry respectively to the places of destination in the United States, over the same line, and in the same direction. To hold otherwise would be for the commission to create exceptions to the operation of the statute not found in the statute; and no other power but congress can create such exceptions in the exercise of legislative authority."

It further said: "Imported foreign merchandise has all the benefit and advantage of rates thus made in the foreign ports. It also has all the benefit and advantage of the low rates made in the ocean carriage arising from the peculiar circumstances and conditions under which that is done; but when it reaches a port of entry of the United States, or a port of entry of a foreign country adjacent to the United States, in either event, upon a through bill of lading, destined to a place in the United States, then its carriage from such port of entry to its place of destination in the United States under the operation of the act to regulate commerce must be under the inland tariff from such port of entry to such place of destination covering other like kinds of traffic in the elements of bulk, weight, value, and of carriage, and no unjust preference must be given to it in carriage or facilities of carriage of that freight. In such case all the circumstances and conditions that have surrounded its rates and carriage from the foreign port to the port of entry have had their full weight and operation, and its carriage from a port of entry to the place of its destination in the United States the mere fact that it is foreign merchandise, thus brought from a foreign port, is not a circumstance or condition under the operation of the act to regulate commerce which entitles it to lower rates, or any other preference, in facilities and carriage, over home merchandise or other traffic of a like kind carried by the inland carrier from the port of entry to the place of destination in the United States, for the same distance, and over the same line."

Its conclusion was that foreign and home merchandise "under the operation of the statute, when handled and transferred by interstate carriers engaged in carriage in the United States, stand exactly upon the same basis of equality as to tolls, charges, and treatment for similar services rendered."

This rule, having been founded upon a construction of the statute, is a very broad one. It is applicable to all the foreign circumstances and conditions which affect rates, and the question whether it must be universally applied without regard to any circumstances which may exist in a foreign country, and whether dissimilarities which have a foreign origin are to be excluded from consideration under the operation of

the statute, is an exceedingly important one, whose ultimate decision may have a wider influence upon the interstate commerce of the country than we can foresee. This legal question was not discussed in the export-rate case, which was treated "as one of practical policy." We are not disposed to pass authoritatively upon this question, except in a case which demands it, and in which the effect of this construction of the statute is naturally the subject of discussion.

This petition presents a question of narrow limits, which relates only to the validity of the order so far forth as it concerns the conduct of the defendant in its joint rates for transportation of imported traffic from New Orleans to San Francisco, and is whether these rates subject domestic traffic between the same points to an undue disadvantage. The same conditions exist between New Orleans and San Francisco, with reference to each class of goods. There was no "difference in cost, expense, or the exceptional character of the service." The only reason which induces the defendant to take the import business is competition in Great Britain between water-routes, which drives it to carry an imported case of cutlery for 80 cents per hundred pounds, when it requires a hundred pounds of domestic cutlery to pay \$3.70 for the same carriage. Assuming that ocean competition can create a dissimilar condition, which is to be considered in determining whether discriminations against particular classes of traffic are unjust, and is a fact to be taken into account in determining whether a particular traffic is subjected to an unreasonable disadvantage (*Phipps v. Railroad Co.* [1892], 2 Q. B. 229, 50 Am. & Eng. R. Cas. 494), does this condition justify the great disparity in rates in this case? While it is true that under sections 2 and 4 of the statute substantially dissimilar conditions may justify dissimilarity in rates, it does not follow that any dissimilar condition, of whatever kind it may be, justifies any discrepancy in rates. Gross inequality shows either that the road which makes the inequality is unjust to itself in carrying goods without profit, "or else the larger rate gives an unwarranted return for the services rendered." Board of Trade of Chattanooga v. East Tennessee, V. & G. R. Co., Inter St. Commerce Decisions, Dec. 30, 1892. In this case it may fairly be presumed that the joint rates gave each road something more than the cost of movement, leaving repairs, interest upon floating debt, and all fixed charges to be paid by the rates upon some other traffic. The rates were not entirely unremunerative, and, if so, the much larger rates placed upon domestic traffic not only compelled it to bear an undue burden, but gave the company an unwarranted return. Exhibit 36

cannot be examined, in the light of the admitted facts of equality of conditions from the port of New Orleans, without the conviction that, unless the defendant is injuring itself by its rates upon imported goods, it is imposing an exceedingly high rate upon domestic goods. It is true that a person who pays only a fair price for a service cannot justly complain merely because another pays too little for the same service (*Garton v. Railroad Co.*, 1 Best & S. 112), but this general truth does not meet the conditions of this case, which are of such inequality that the larger rates must be found to be excessive. It has been justly said by the commission that rates should not only be reasonable, but be relatively reasonable, and thus not become unjust in their results. *Boards of Trade Union v. Chicago, M. & St. P. R. Co.*, 1 Inter St. Commerce Com. R. 215. It follows that the conduct of the defendant was in violation of sections 2 and 3 of the statute in question, and was properly attempted to be corrected by the order which was disobeyed.

But it will be urged that, if it is assumed that ocean competition can create a dissimilar condition, it follows that it is a condition which may rightfully be regarded in establishing rates for importand domestic traffic, and that the order of the commission which directed equality should not be enforced, because some inequality might be justifiable. The accusation against the railroad companies in the original complaint before the commission was not that they were charging too low rates upon import traffic, but that by these relatively excessive rates upon domestic traffic they were unjustly discriminating against the latter. The underlying question which arises upon the petition to the circuit court is the same. The defendant's answer before the commission averred that its "domestic rates are fair and reasonable in themselves." In its answer to the petition it omits this averment, does not justify its rates upon domestic traffic, and does not state, if a reduction should be made, what excess of rates could properly be placed upon that kind of traffic; but defends the existing difference in rates solely upon the ground that if it charged higher rates upon the import traffic it would lose that class of business.

The final question before the circuit court was: "Is the order of the commission a proper one, and should obedience to it be insisted upon?" In order to decide that question, the answer presented two questions upon the subject of rates: (1) Can ocean competition be regarded, in any event, as creating a dissimilar condition? (2) If it can, is the difference in the existing rates justified by that condition? A third question might have

Inequality of rates.

Ocean competition—Dissimilar condition.

been, but was not, presented, viz.: In the event that the first question is answered in the affirmative, and the second is answered in the negative, does the dissimilar condition justify any, and, if so, what, dissimilarity in rates? To answer this question the court should have been informed in regard to the reasonableness of existing rates upon domestic traffic. This court is of opinion that, assuming that the first question can be answered in the affirmative, the second must be answered in the negative, and that an unfair inequality of rates is plainly manifest. There is nothing in the record which enables the court to determine that the assumed dissimilar condition justified any substantial dissimilarity in rates, and it ought not to permit disobedience to an order until it can suggest a better one as a substitute.

The defendant's apparent position that, inasmuch as substantially dissimilar conditions create dissimilarity in rates, the amount of dissimilarity in rates is not important, cannot be sustained. That some dissimilar conditions justify dissimilarity in rates is true. That remote dissimilarities of condition justify any dissimilarities which the carrier chooses to make is not true.

Fixing rates
arbitrarily.

To set aside the order of the commission, and permit the present excessive inequality of rates, in the absence of any attempt to show the reasonableness of the inequality, would not accord with justice.

Two objections which have been taken by the defendant to the jurisdiction of the court remain to be considered. Section 16 provides that in case of the disobedience of a common carrier, which is subject to the provisions of the act, to a lawful order of the commission, the latter can apply for an injunction by petition to the circuit court sitting in equity in the judicial district in which the carrier has its principal office, or in which the disobedience of such order has taken place. This petition was brought in the southern district of New York, upon the ground that the principal office of the defendant was in the city of New York, whereas it is said to be in Texas. The charter does not declare where the principal office of the company shall be. In fact, the stockholders' meetings and directors' meetings are held in New York, where also is the office of the president, first vice-president, secretary, and treasurer of the company, and where the stock-certificate books and records of the stockholders' and directors' meetings are kept. The New York office is thus the domicile of the corporation, and the principal office, while the general or administrative offices of the heads of departments are in Texas.

Principal
office of cor-
poration.

It is also contended that, inasmuch as the rates upon im-

port traffic were joint rates with the Southern Pacific Railway Company, and as any order of the circuit court requiring the defendant to desist from carrying business upon such joint routes would abrogate contracts and agreements to which said company is a party, it is a necessary party to the petition. It is true that in proceedings before the commission to test the legality of through rates, the commission, which has the power to make other common carriers parties, irrespective of their places of residence, has insisted upon the necessity of bringing in all the corporations which make the rates, and has said: "They must be brought in, first, because they have a right to be heard; and, second, because an order made and purporting to control their action when they were not parties would be improper on its face, and in a legal sense ineffectual." *Allen v. Railroad Co.*, 1 Inter. St. Commerce Com. R. 199. In the proceeding before the commission the Southern Pacific Railway Company was a party. The present proceeding is a petition to compel obedience to an order, made upon hearing, and presumably correctly made, which is brought before a circuit court whose jurisdiction over parties is limited and controlled by statute. The circuit court for the southern district of New York has no jurisdiction over the southern Pacific Railway Company, whose principal office is not in that district. Neither would a circuit court in any one district in which the violation was committed, in Texas or Louisiana or California, probably be able to obtain jurisdiction over both the railroad companies which made the rates. The proceeding before the circuit court should not be rendered impossible in the event of its inability to obtain jurisdiction over all the disobeying companies which have united in making through rates, and inasmuch as the proceeding is to enforce an order already made, after hearing all the parties in interest, the presence of all the parties who have jointly disobeyed is not necessary or indispensable.

Joint disobedience of order of interstate commerce commission—Enforcement against one disobedient company.

The decree of the circuit court is affirmed, with costs.

Railway Rates and Discriminations.—See note 23 Am. & Eng. R. Cas. 614.

Freight Charges by Railroad Companies.—See exhaustive note, 85 Am. & Eng. R. Cas. 52.

What Constitutes Discrimination Under Interstate-commerce Act—Exaction of Excessive Charges from Local Shipper.—In *Parsons v. Chicago & N. W. R. Co.* (U. S. Cir. Ct. App. 8th Cir., Sept. 24, 1894), 63 Fed. Rep. 903, it was held that the fact that a railroad company charges a local shipper more for transporting property between two points on its road than it charges for the same wares when the property transported is received from a connecting railroad, and is carried under a joint tariff established by the

connecting carriers, is sufficient evidence to establish the charge of an undue preference or discrimination under the third section of the Interstate-commerce act. *Following* Tozer v. United States, 52 Fed. Rep. 917.

Charge of Local Rate in Excess of that Charged for Longer Haul Under Joint Tariff.—In Parsons v. Chicago & N. W. R. Co. (U. S. Cir. Ct. App. 8th Cir., Sept. 24, 1894), 63 Fed. Rep. 903, it was held that a local rate between two points on the same road is not necessarily unlawful because it is higher than the rate charged under a joint tariff for a much longer haul over a line which is composed in part of that portion of the road to which the local rate applies. *Following* Railway Co. v. Osborne, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18.

Reduction of Joint Rate.—In Parsons v. Chicago & N. W. R. Co. (U. S. Cir. Ct. App. 8th Cir., Sept. 24, 1894), 63 Fed. Rep. 903, it was held that where two connecting carriers unite in a joint tariff they form practically a new and independent line, and the joint rate established over such line may be made less than the sum of the local rates or even less than the local rates of either company over that part of its road constituting a part of the joint line without violating the long- or short-haul clause of the interstate commerce act. *Following* Railway Co. v. Osborne, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18.

Furnishing Free Cartage from Station.—In Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that in so far as the greater amount of business enables a railway company to do carting at a cheaper rate at one of its stations than at another, by so much may the carrier reduce the cartage cost to the shipper at the former place, because this is a legitimate and actual dissimilarity in conditions between the two places; but as cartage must cost something, free cartage at one station, confers on the shipper a benefit which dissimilarity of conditions does not justify.

Right to Charge Reduced Joint Rates.—In Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that free cartage from a railroad station to points within the city where the station is situated and the failure to furnish a like accommodation to consignees in another city on the line of the road, was a discrimination in rates, which was not justified by the fact that the place at which the company furnished free cartage was larger than such other place, and that the greater amount of business done at such larger place enabled it to furnish the free cartage.

Violation of Long and Short-haul Clause.—In Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that free cartage by a railroad company from its station to points within one city, which service it does not render to consignee in other cities, was a reduction of rates in the place where such service was rendered to the extent of the cost of the cartage to the consignee, and was a violation of the long- and short-haul clause of the interstate commerce act.

Justification by Custom.—In Interstate Commerce Commission v. Detroit, G. H. & M. R. Co. (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that free cartage by a railroad company from its station in one city but not in other cities on the line of its road, is not justified by the custom among railroads to furnish those of their customers whose storehouses are convenient to the railroad track with switch tracks, so that upon these tracks consignments in car-loads are delivered at the door of the consignee.

What Constitutes Like Traffic Under Similar Conditions.—In Savitz v. Ohio & M. R. Co., 150 Ill. 208, it was held that the fact that a carrier charges one shipper more than another for carrying merchandise from

the same place, is not conclusive evidence of unjust discrimination if it is shown that there is a difference in the commodity and in the method of handling it.

In *Chicago, R. I. & P. R. Co. v. Hubbell* (Kans.), Nov. 10, 1894, 38 Pac. Rep. 266, it was held that a contract for the transportation of freight from a point in Missouri to a point in Kansas for a rate less than that demanded and collected from other persons for a like service at the same time, where the usual rate is not unreasonable nor excessive, violates the provisions of the interstate-commerce act, and is utterly void.

In *Bigbee & Warrior, R. P. Co. v. Mobile & O. R. Co.* (U. S. Cir. Ct. S. D. Ala., Dec. 30, 1893), 60 Fed. Rep. 545, it was held that the dissimilarity in the circumstance that one lot of merchandise comes from one point and another lot from another point, was not such a substantial dissimilarity as is contemplated by the interstate-commerce act, which provides, in section 2, that it shall be unlawful for any common carrier subject to the provisions of the law to demand, collect, or receive from any person or persons a greater or less compensation for any services rendered or to be rendered in the transportation of property than it charges, etc., to any other person or persons for doing for him or them a like contemporaneous service in transportation of a like kind of traffic under substantially like circumstances and conditions, and in section 3, that it shall be unlawful for any such carrier to make or give any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or to subject any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatever.

Effect of Grouping Stations for Purpose of Establishing Rates.—In *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that the grouping together by a railroad company of two places as stations to which freight rates from a distance may properly be made the same, was an admission that transportation from such distance to warehouses of the company at the two places was substantially under the same circumstances and conditions.

Effect of Intent to Discriminate.—In *Parsons v. Chicago & N. W. R. Co.* (U. S. Cir. Ct. App. 8th Cir., Sept. 24, 1894), 63 Fed. Rep. 903, it was held that the action of a carrier will not be deemed an illegal discrimination although so intended, when it is not such in fact.

Equal Facilities for Interchange of Traffic—Right of Railroad Company to Use Tracks of Connecting Line.—In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (U. S. Cir. Ct. E. D. Ark., Jan. 5, 1894), 59 Fed. Rep. 400, it was held that a railroad company is under no obligation to allow another company the use of its tracks for the purpose of engaging in interstate commerce, and where the relief asked against a railroad company cannot be granted without use of its tracks, and by compelling it to haul freight in other cars than its own over its own track at a less rate than it would receive or be entitled to receive if the freight was hauled in its own cars, such relief must be refused.

The court, after citing and commenting on *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. Rep. 567; *Oregon Short Line & U. N. R. Co. v. Northern Pac. R. Co.*, 51 Fed. Rep. 465, said: "These adjudications establish four propositions: First, that the tracks and terminal facilities of the defendants can only be used by the plaintiff railway for the exchange of interstate freight, with the consent of the defendants; second, that no common carrier can justly complain of another because it is not allowed the use of the tracks and terminal facilities of such other railway company in the same manner and to the same extent another is; third, that the fact that one connecting railway company has a contract for the interchange of

interstate-commerce freight, which involves the use of the receiving railway's tracks and terminal facilities, would not authorize a court of equity to compel the receiving railway to grant a like contract or concession to another connecting company; fourth, that the connecting railway company, desiring an interchange of freight and passengers, cannot demand, as a matter of right, an interchange of freight at the point of physical connection without first furnishing at such point reasonable and proper facilities for the interchange sought, and cannot rely upon the terminal facilities at another point, nor compel the receiving railway to go to any expense of providing proper facilities at the point of physical connection."

Right to Compel Railroad Company to Contract with Connecting Line.—In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (U. S. Cir. Ct. E. D. Ark., Jan. 5, 1894), 59 Fed. Rep. 400, the court held that it had no power to compel a railroad company to enter into a contract with another company for a through routeing and a through rating, for the reason that a third company had by contract or agreement acquired an arrangement for such routeing and rating with the company sought to be compelled to enter into the contract.

Right of Connecting Line to Require Prepayment of Freight Charges.—In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (U. S. Cir. Ct. E. D. Ark., Jan. 5, 1894), 59 Fed. Rep. 400, it was held that a railroad company is under no obligation to receive freight from another line unless prepayment of freight charges is tendered if payment thereof is demanded, and the fact that the company carries freight for other roads without requiring prepayment therefor does not entitle another applicant to the benefit of the same arrangement.

Violation of Interstate-commerce Act—Complaint by Person without Real Grievance in Interest of Competing Line.—In *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* (U. S. Cir. Ct. W. D. Mich., S. D., Oct. 6, 1893), 57 Fed. Rep. 1005, it was held that the *bona fides* of a complaint made against a railroad company by the Interstate Commerce Commission cannot be attacked by impeaching the good faith of those who, in the first instance, induced the commission to take action, and that hence it is not a valid objection to action by the United States circuit court that the complainants before the commission had no real grievance, but were instigated to their prosecution by a competitor of the defendant.

Jurisdiction of Federal Court of Action by One Company against Other Companies to Compel Grant of Facilities.—*Ex parte Lennon* (U. S. Cir. Ct. App. 6th Cir., Oct. 2, 1894), 64 Fed. Rep. 320, it was held that a suit by one railroad company against several other companies to compel them to accord to it the rights and privileges to which it claims to be entitled by the interstate-commerce act involves a federal question of which a court of the United States has jurisdiction.

Report of Interstate Commerce Commission as Establishing of Rates—Effect of Traversing Conclusions of Report.—In *Shinkle, W. & K. Co. v. Louisville & N. R. Co.* (U. S. Cir. Ct. S. D. Ohio, W. D., July 30, 1894) 62 Fed., Rep. 690, it was held that, assuming that upon an application by shippers for a preliminary injunction to compel obedience by a railroad company to an order of the Interstate Commerce Commission, the report of the commission is to be regarded as making out a *prima facie* case of illegal rates, that the effect of such report is lost, when an issue is made by the sworn answer upon the principal conclusions of the report.

Right to Permanently Enjoin Violation of Interstate-commerce Act, before Trial.—In *Shinkle, W. & K. Co. v. Louisville & N. R. Co.* (U. S. Cir. Ct. S. D. Ohio, W. D., July 30, 1894), 62 Fed. Rep. 690, which was an application by a railroad company to dissolve a preliminary injunction obtained against it without notice, and which required it to obey an order of

the Interstate Commerce Commission, the court held, in view of the wide scope of territory affected by the report of the commission, and the importance of the questions of fact and law arising thereon, and that many important and unsettled questions of law were involved and would demand consideration, that the preliminary injunction should be dissolved and the complainants relegated to a hearing in which their right to a perpetual injunction could be determined.

Binding Effect on Federal Courts of Decisions of Interstate Commerce Commission.—In *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* (U. S. Cir. Ct. E. D. Ark., Jan. 5, 1894), 59 Fed. Rep. 400, it was held that the decisions of the Interstate Commerce Commission, while entitled to great respect, are not binding on the federal court.

Jurisdiction of State Courts over Issues Arising out of Interstate Commerce.—In *Murray v. Chicago & N. W. R. Co.* (U. S. Cir. Ct. N. D. Iowa, Cedar Rapids Div., June 4, 1894), 62 Fed. Rep. 25, it was held that the fact that interstate commerce is beyond state legislative control does not *ipso facto* prevent such courts from exercising jurisdiction over cases which grow out of such commerce.

Removal to Federal Court of Action begun in State Court.—In *Swift v. Philadelphia & R. R. Co.* (U. S. Cir. Ct. N. D. Ill., Nov. 27, 1893), 58 Fed. Rep. 858, it was held that the federal circuit court has no jurisdiction of an action brought in the state court for the enforcement of the provisions of the interstate-commerce act, and removed from that court. The court said: "Those counts of the declaration which proceed directly upon the interstate-commerce act cannot be sustained in these suits. The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate-commerce rate is a matter of primary, as well as of exclusive, jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts, acquired by the fact of diverse citizenship."

Construction of Section 16 authorizing Injunction to Enforce Orders of Commission.—In *Shinkle, W. & K. Co. v. Louisville & N. R. Co.* (U. S. Cir. Ct. S. D. Ohio, W. D., July 30, 1894), 62 Fed. Rep. 690, it was held that section 16 of the interstate-commerce act, authorizing the circuit court to enforce its lawful orders or requirements of the Interstate Commerce Commission by injunction only contemplates an injunction as the final result of a hearing on pleading and proof.

OREGON SHORT LINE & UTAH NORTHERN R. CO.

v.

NORTHERN PACIFIC R. CO.

(*United States Circuit Court of Appeals, 9th Circuit, April 12, 1894, 61 Fed. Rep. 158.*)

What Constitutes an Unreasonable Discrimination Under the Interstate-commerce Act.—The refusal of a railroad company to transport goods over its line of road on the cars of another company, when its own cars are not in use, but are free to be employed in the transportation desired, or a refusal made at a time when the transfer of the merchandise would not have been injurious to it, will not amount to an unreasonable discrimination against such other company, or a denial to it of reasonable and proper facilities within section 3 of the interstate-commerce act, which requires carriers to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines.

Same—Failure of Railroad Company to Honor Passage Tickets of Connecting Line.—In the absence of any arrangement between railroad companies operating connecting lines as to the tickets or coupons for passage issued by each other, there is no obligation on the part of either company to honor tickets of the other company.

Same—Construction of Charter of Northern Pacific R. Co.—Running Connections.—The charter of the Northern Pacific Railroad Company, which requires it to permit any other railroad which shall be built by the United States or by the legislature of any territory or state in which the same may be situated to form running connections with it on fair and equitable terms, only authorizes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities as will enable such companies desiring to connect, to do so without detriment or serious inconvenience to the Northern Pacific Company.

APPEAL from United States circuit court for the district of Oregon.

W. W. Cotton, John M. Thurston, and Zera Snow, for appellant.

Dolph, Bellinger, Mallory & Simon, for appellee.

Before McKENNA, Circuit Judge, and KNOWLES and HAWLEY, District Judges.

McKENNA, Circuit Judge.—As is said by appellant's counsel, "the controversy between the parties in this suit is mainly one of law, and not of fact;" and, succinctly stating the relations of the parties, also said: "The appellee owns and operates a line of railroad extending from St. Paul, Minnesota, to Portland, Oregon, passing through Tacoma and other points in the state of Washington,"

Case stated.

on Puget sound. The appellant owns and operates a line of railway connecting with the lines of the appellee at Portland, and extending from Portland to Granger, Wyoming, where a connection is made with the lines of the Union Pacific Railway, extending thence to various points on the Missouri river. The appellee and appellant are therefore competing lines in the transportation of traffic from Missouri-river points to places upon the Pacific coast. The only rail connection which the lines of the appellant have from Portland to Puget sound is by means of the lines of the appellee." The connection, however, is not direct, but through the lines of the Northern Pacific Terminal Company. The latter, however, are leased to appellee. We shall consider the case as if the connection was direct.

The bill is very long. In substance, it charges appellee with discriminating against traffic, passengers and freight, starting east of a given meridian, and destined for Puget-sound points via Portland, Or., and also discriminating against localities situate east of a given meridian. There is also a charge that facilities are given to the Southern Pacific Company which are denied to appellant. This charge is not sustained by the evidence, and may be dismissed from consideration. The discrimination against traffic and localities consists in receiving goods at Portland which start west from the meridian in cars other than those of appellee without requiring payment to the owners of the cars of the usual mileage, and without exacting prepayment of freight, while goods which start east of the meridian are denied these facilities; and in receiving through tickets issued by appellant to passengers starting west of the meridian, and refusing such tickets issued to passengers starting east of the meridian; the condition and other circumstances of the freight and passengers being the same. The action, appellant contends, is contrary to the custom and practice of railroads which have the force of law, and infringes section 3 of the interstate-commerce Act, so called. This section is as follows:

"Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange

of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines. But this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business."

The first part of this section prohibits preference to persons, firms, or corporations, and to localities and traffics, and prohibits the subjecting of either to prejudice or disadvantage. The evidence shows that there was no preference given any person, firm, or corporation in the sense of this section, and no traffic or locality is complaining, unless the complaint of appellant is such. But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under section 3, and complain on account of it.

In *Express Cases*, 117 U. S. 1, 23 Am. & Eng. R. Cas. 545, certain railroad companies made contracts with certain express companies granting them facilities on their trains, refusing contracts and facilities to other express companies. The supreme court sustained the railroad companies, reversing the judgment of the circuit court. The court said: "The question is not whether these railroad cars must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines."

And again, on page 28, 117 U. S., the court says: "If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or allow it to be carried by others, different questions would be presented."

And the court further said: "So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them."

This language is applicable to the case at bar. Whether appellant shall unload its cars at Portland as an alternative to paying car mileage, however it may involve expense or inconvenience to appellant, is not necessarily the concern of the freight or its shippers or the locality of its shipment. When it becomes such, a complaint will no doubt be made. None now is made, nor does it appear that either the traffics or localities discriminated against are even competitors. In *Hozier v. Railroad Co.*, 1 Railway & Canal Traffic Cas. p. 30, of the traffic act, it was said: "It provides for giving undue preference to parties *pari passu* in the matter, but

you must bring them into competition in order to give them an interest to complain."

In *Swindon, M. & A. R. Co. v. Great Western R. Co.*, 4 *Railway & Canal Traffic Cas.* 349, it is implied that to make undue preference, traffic must go between same places. And in 1 *Railway & Canal Traffic Cas.* 32, the same rule is asserted as to passengers. To construe the section so as to authorize a railroad to complain for a traffic or locality would seem to confound the distinctions made by it, and make the second part of it superfluous. The regulation of the roads was undoubtedly in the interest of their customers, but it left them powers and privileges between themselves which might affect their customers; indeed, left powers and privileges in them as regards their customers, because all favor and all discrimination is not forbidden, even between them.

This view takes out of consideration the rights of the traffic originating and the rights of localities situate east of a given meridian, and confines the inquiry to the rights and obligations of the railroads between themselves under the second paragraph of the section.

As an aid to the interpretation of this paragraph, a number of cases which arose under the English act are cited by appellant. They are not of much assistance. The English act is different from ours. It is fuller and more precise. There is little or no ambiguity about it. At any rate, our act is different, and the difference has been construed as substantial. *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 41 *Fed. Rep.* 559, 42 *Am. & Eng. R. Cas.* 490, and *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 *Fed. Rep.* 567. See also the first decisions of the Interstate Commerce Commission. But in *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.*, 3 *Interst. Commerce Com. R.* 1, the commission holds that our act was intended to effect similar results, but omitted the machinery to accomplish them. It would seem like better reasoning to assume that, if congress had intended the same results as the English act, having it and its history and construction before them, it would have adopted its language and machinery, and made the results certain.

We get little light, therefore, from the English act or decisions, and not much from the debates in congress. There was little or no comment on section 3. Section 4 (the long- and short-haul provisions) appeared to have engaged almost exclusive attention. Senator Cullom, who had charge of the bill in the senate, said: "The third section is broader and more general in its terms, and should perhaps have been made the second section, as it contains a general prohibition of every variety of unjust discrimination. The section covers

all subjects. The first paragraph prohibits the giving of any undue or unreasonable preference to any particular person or locality, or to any particular description of traffic in any respect whatever. * * * The language adopted in this paragraph is substantially that of the English statute on the subject, which has been repeatedly construed by the English courts, so that its meaning has been practically established. The second part of the section is modeled in part upon the English and in part upon similar statutes in several of the states. Its purpose is to require railroads to furnish connecting roads all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road, or a combination of roads, from 'freezing out' connecting lines by refusing to accept from it, or deliver traffic to it, upon any terms, as has been done." Senator Cullom's Speech Explaining the Bill, section 1, p. 3577, Cong. Rec. 49th Cong., April 15, 1886.

This is not very explicit. The first part of section 3, he says, is adopted from the English statute, and that its meaning has been practically established. So far, so good. But the second part is selected from the English and certain states' statutes, and, besides, very important language is omitted which is in the English statute. And, as Justice FIELD states: "Whenever an intention has been manifested, in the creation of railway charters, that a connecting company shall have the power to run its cars over the lines of another, or to require one company to haul over its lines the cars of another, such intention has been expressed in unequivocal terms, such as is found in the constitutions or statutes of several of the states respecting railway companies which is substantially in these terms: 'And they shall receive and transport each other's passengers, tonnage, and cars, loaded or empty, without delay or discrimination.'"

Senator Cullom stated the evil which was to be remedied. Railroads had refused to accept or deliver traffic on any terms, and thereby froze out connecting lines. This the act was intended to correct, and did correct. But confining it to this, appellant contends, makes no advance on the common law; and that, under the latter, the appellee was bound to carry freight in its own cars, and that, therefore, congress intended to impose a duty beyond that. This is begging the question somewhat, and does not consider the distinction between rights and remedies; but whether the common law required a railroad company to carry freight delivered to it by another we need not consider. The fact was, as said by Senator Cullom, it was not done, and the act was deemed necessary to compel it. Whether common-law rights were enlarged

thereby or only affirmed we need not decide. If we assume the former, as appellant has, we cannot also assume that the independence of the roads between themselves was entirely destroyed. Not all preference is prohibited—only undue and unreasonable preference; and the facilities which are required to be granted have two limitations: They ^{Unreasonable} do not include tracks and terminal facilities, and ^{discrimina-} they must be reasonable and proper. How must ^{tions.} the latter be determined? Surely not only of themselves, but in the circumstances, and these must include the proper interests of the road from which the facilities are required. Any other construction would be too abstract, and we concur in the opinion of the learned justice who rendered the judgment of the circuit court “that the refusal to transport freight on foreign cars, where the freight originated east of the ninety-seventh meridian, when its own cars were not in use, but were free to be employed in the transportation desired, or was made where a transfer of freight would not have been injurious to it, can in no respect be deemed an unreasonable discrimination against the complainant, or a denial to it of reasonable and proper facilities.”

Of course, if appellant's construction of section 3 be correct, and it can compel appellee to receive one car, by the same right it may compel the receipt of many, and what more would be necessary to take the use of tracks? We think nothing. The attachment of the locomotive would only affect the degree of use. The same conclusion was reached after a careful consideration of all the cases by the circuit court of the eighth circuit in *Little Rock & M. R. Co. v. St. Louis, I. M. & S. Ry. Co.*, 59 Fed. Rep. 408. A construction which permits the use of tracks we are forbidden to entertain.

Of the complaint of appellant that appellee denies it facilities for passenger traffic in refusing to honor tickets or coupons for passage over appellee's lines north of Portland issued by it, the lower court said: “It is sufficient to say there is no evidence to support it. The practice of railway companies operating connecting lines to honor tickets or coupons for passage over their respective lines issued by a connecting company, which is very general, is ^{Tickets of con-} founded entirely upon arrangements between the ^{necting lines.} connecting companies. In the absence of such arrangements, there is no obligation on the part of either company to honor tickets issued by the other. All the witnesses examined on this point concur in their statements in this respect.”

We concur in this statement and the conclusion of the court.

Appellant further urges that the facilities which it asks of appellee are required to be given by the fifth section of the act incorporating the Northern Pacific Railroad Company, which contains the following provision: "It shall be the duty of the Northern Pacific Railroad Company to permit any other railroad which shall be authorized to be built by the United States or by the legislature of any territory or state in which the same may be situated to form running connections with it on fair and equitable terms."

Northern Pac.
R. Co. running
connections.

In answering this contention we can do no better than to adopt the language of Justice FIELD: "The running connection," he said, "which must be permitted by the defendant is not, as contended by complainant's counsel, a running over its line, but only in connection with it, a provision intended to secure the transportation and exchange of freight between connecting lines, and not the use of each other's roads by the cars of such companies. * * * We are of opinion that a running connection of one road with another, within the meaning of the defendant's charter, only includes such arrangements as to the time of arrival and departure of trains, and as to stations, platforms, and other facilities, as will enable companies desiring to connect to do so without detriment or serious inconvenience."

The effect of a custom among railroads to grant the facilities contended for we have not considered, because the existence of such a custom is not established by the evidence. The finding of Justice FIELD on the facts seems to be concurred in by Judge DEADY. His dissent is based entirely on a different interpretation of section 3 of the Interstate-commerce Act, and of section 5 of the act incorporating the Northern Pacific Railroad Company.

Judgment is therefore affirmed.

Discrimination Between Connecting Lines—Interstate-commerce Act.—See *New York & Northern R. Co. v. New York & New England R. Co.* (C.C.), 53 Am. & Eng. R. Cas. 7, and note 14; *Little Rock & Memphis R. Co. v. East Tennessee, Virginia & Georgia R. Co.* (C.C.), 49 Am. & Eng. R. Cas. 23, and note 36. Note *Interstate Commerce Commission v. Texas Pacific R. Co.* *ante* p. 48, and note, 57.

ST. JOSEPH & GRAND ISLAND R. CO.

v.

PALMER.

(88 *Nebraska*, 468.)

Actions Against Carriers—Effect of Interstate-commerce Act on Jurisdiction of State Courts.—The state courts have not lost their jurisdiction of the subject-matter of actions against carriers because of interstate shipments, by reason of the fact that congress has legislated upon the subject.

Power of Carrier to Limit its Liability.—A railroad company, in the carriage of goods, is subject to the liability of a common carrier, and must answer for all losses not occasioned by the act of God or the public enemy, and cannot, in this state, by special contract, limit or relieve itself from this liability.

Same—Contract of Carriage from Point Within to Point Without the State.—The fact that the contract was for the carriage of goods from a point in this state to a point in another state does not change the rule.

ERROR to Adams county district court.

John M. Thurston, W. R. Kelly, and E. P. Smith, for plaintiff in error.

John M. Ragan, for defendant in error.

IRVINE, C.—The plaintiff in error was a railroad company operating a line of railroad between St. Joseph, Mo., and Grand Island, Neb., and passing through the city of Hastings, Neb. In December, 1889, certain goods were loaded into a car at Hastings for shipment to Grant's Pass, Or. These goods consisted of furniture, wearing apparel, and household goods, belonging partly to one Pardee, and partly to one Hart, and of a stock of drugs and drug-store fixtures belonging to the defendant in error, Palmer. The goods were carried to Grand Island by the plaintiff in error, and there turned over to the Union Pacific Railway Company, on the line of whose road the car was wrecked, and no part of the goods was ever delivered at Grant's Pass. Pardee and Hart assigned their claim to Palmer, who brought suit in the district court of Adams county to recover damages for the loss of the goods. Case stated.

The petition of the plaintiff below, in addition to the foregoing facts, which are undisputed, pleads, among other things, that Palmer, Pardee, and Hart entered into a verbal contract with the defendant to transport said goods and prop-

erty to Grant's Pass, and there safely deliver them in 10 days, in consideration of the sum of \$200, and that after the goods were loaded into the car a paper was presented to Pardee for signature, and he signed it believing it to be a receipt, and in ignorance of certain clauses therein contained; that after the goods were turned over to the railroad company for shipment, and the freight of \$200 paid, the railroad company's agent stated to the owners that the \$200 might not be enough to pay the freight, and extorted from the owners a promise that, in case the freight should exceed \$200, they would pay the excess; that the paper referred to was not the contract of shipment, but that the contract was as first stated, and that the contents and limitations of the paper were fraudulently concealed from the owners of the goods. The paper referred to was in fact a bill of lading, and the clauses in regard to which fraud was alleged were two: The first was that the railroad company assumed no liability beyond the end of its own line; that is, at Grand Island, Neb. The other is as follows: "One car emigrant outfit O. R. Rel'd val. of \$5 per cwt. in case of total loss S L & C."

The answer, so far as it is material, may be analyzed as follows: First. That the railroad was engaged in the business of interstate commerce, and that this was an interstate shipment, and not within the jurisdiction of the state courts. Second. That the bill of lading constituted the contract between the parties, that the first provision quoted exempted the defendant beyond the end of its own line, and that there was no fraud or concealment. Further, that the somewhat cabalistic letters and words quoted from the bill of lading meant, and were understood to mean, owner's risk released to the value of five dollars per hundredweight in case of total loss, and that the shippers were to load and count the goods. Third. That the contract between the parties contemplated merely the shipment of an emigrant outfit, which was understood to mean household goods alone, and that the stock of drugs was fraudulently loaded into the car; the established rate on a car containing drugs being very much greater than the established rate on an emigrant outfit. Fourth. That, under the Interstate-commerce Law, false representations as to the contents of the package, with the consent and connivance of the carrier or its agent, is constituted a misdemeanor, and bars the plaintiff from relief.

The evidence upon the part of the plaintiff tends to show that Pardee and Hart went to the agent of the company at Hastings, stating to him that they wished to ship their household goods and stock of drugs, and asked him for the rate to Grant's Pass upon the car load; that the agent informed

them that the rate would be \$200, and that there would be nothing to pay at the other end of the line; that thereupon the goods were loaded upon a car furnished by the railroad company for that purpose; that, after the loading was complete, Pardee and Palmer went to the agent for the bill of lading; that the agent told them that, inasmuch as the drugs had been loaded upon the car, he was not sure that \$200 would pay the freight, but that he would mark upon the bill of lading a receipt for the \$200, to apply on the freight, and if there was more to pay it must be paid at the other end; that they consented to this because there was no other course left open to them; that the bill of lading was then handed to them, and Pardee signed it, none of the owners reading its conditions, or having his attention called thereto. Upon the part of the railroad company the testimony tends to show that, at the first interview, nothing was said about the stock of drugs, but that, when Pardee came for the bill of lading, the agent told him that he would not give him a clear bill of lading, for he had reason to believe that "there was other stuff in the car besides household goods," but would accept \$200, to be applied, the owners to pay the difference at the other end; that Palmer then handed him \$200, and Pardee signed the bill of lading in duplicate.

The case was submitted to the jury under long instructions, the general effect of which was to submit the question as to whether the oral agreement pleaded, or the bill of lading, constituted the contract between the parties; further, to instruct the jury that under the laws of this state no limitations upon the liability of a common carrier could be imposed, except upon proof that such limitations had been called to the attention of the shipper, and by him expressly assented to, and submitted to the jury whether or not attention had been called to the limitations and assent obtained. There was a verdict for the plaintiff in the sum of \$5,461.53.

1. The question of jurisdiction was first raised by demurrer to the petition, and then by answer. The theory of the railroad company in this regard seems to be that, the shipment being from one state to another, it became subject solely to the laws of the United States. If that were so, it would not oust the court of jurisdiction. It would only determine upon what principles of law the rights of the party would depend. The record shows that an attempt was made to remove the case to the federal court; that the court refused to order the removal. Nevertheless, it would appear that an order of removal must have been obtained from some source, for there is in the record an order of the federal court remanding the case to

Jurisdiction of
state courts.

the district court of Adams county. These proceedings are a part of the law of the case and conclusively determine the question of jurisdiction in favor of the plaintiff.

2. The questions of law in regard to the transaction are discussed in the briefs under a number of heads relating to objections to the evidence, and to the instructions of the court. To state each in its order would consume much space, and a detailed consideration is unnecessary, for the reason that all these exceptions and assignments of error relate to a very few main questions.

Great stress is laid upon the point that the bill of lading must be treated as the conclusive evidence of the contract between the parties, and that parol evidence was not admissible to show a prior verbal contract contrary to the terms of the bill of lading. In this connection it is also urged very strenuously that the court erred in submitting the question raised by this evidence to the jury; further, it is urged that the instructions to the court are conflicting; and, still further, that the limitations imposed by the bill of lading upon the carrier's liability are, upon principles of common law, valid obligations, and that they must be enforced, in the absence of actual misrepresentations or concealment, which, it is contended, the evidence does not establish. Numerous authorities are cited upon both sides upon these points.

A single consideration disposes of all of these questions. Under the law of Nebraska, whatever the law may be elsewhere, it is beyond the power of a common carrier, **Power of carrier to limit liability.** by such provisions as appear in the bill of lading, —assuming it to be the contract of the parties,— to so limit its liability.

In *Railroad Co. v. Washburn*, 5 Neb. 117, it is said: "The common law fixes the degree of care and diligence due from railroad companies as common carriers; and a failure to exercise this care and diligence is negligence, without any legal distinction, as being gross or ordinary." That the better rule of law, sustained by the weight of authority, is that "it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them for negligence in the performance of that duty." This case arose before the constitution of 1875 went into force.

By article 11, § 4, of that constitution, it is provided that "the liability of railroad corporations as common carriers shall never be limited." While the writer might, if the question were a new one, construe this provision as simply a restriction upon the legislature against the limitation of carriers' liability by law, and not as preventing such limitation by

special contract, the question is no longer an open one, and has otherwise been determined.

In *Railroad Co. v. Vandeventer*, 26 Neb. 222, 37 Am. & Eng. R. Cas. 651, by contract, the railroad company sought to relieve itself from liability for injury to live stock, unless notice in writing were given before the removal of the stock from its place of delivery. This provision of the constitution was there considered and discussed. The court, speaking through Judge COBB, says: "So I conclude that the object and intent of the convention in proposing, and of electors in adopting, this provision of the constitution here referred to, was to put it out of the power of railroads, as common carriers, to limit their liability as such by special agreement with shippers, and thus remove from their officers and agents all temptation to effect such exemption from liability, and the loss and damage to property which might, of necessity, follow the release of their responsibility, and that of their agents, therefor. See *Railroad Co. v. Washburn*, 5 Neb. 117, a case which arose under the old constitution, but heard in this court under the new."

In addition to this constitutional provision, section 111, c. 16, Comp. St., provides that "any railroad companies receiving freight for transportation shall be entitled to the same rights and be subject to the same liability as common carriers." This is a portion of the general incorporation act, under which the plaintiff in error derives its existence as a corporation." Comp. St. c. 72, art. 1, § 5, provides: "No notice either express or implied shall be held to limit the liabilities of any railroad company as common carriers unless they shall make it appear that such limitation was actually brought to the knowledge of the opposite party and assented to by him or them in express terms before such limitation shall take effect."

This section was discussed by the court in *Railroad Co. v. Marston*, 30 Neb. 241, and held to apply to just such a case as this, where the limitation was contained in a bill of lading which the shipper alleged was given after the making of an oral contract for shipment. Irrespective, then, of the question as to whether there was an oral contract, or whether such oral contract or the bill of lading constituted the final arrangement between the parties, the law of this state is settled that a common carrier cannot, even by the terms of an express contract, relieve itself of its common-law liability.

It is said that at common law the common carrier is not liable for loss, in the absence of special contract, beyond the point at which it delivers the goods to a connecting carrier. To this it should be added that the contract of the shipper

was with the carrier first receiving the goods, and if such carrier undertook to deliver the goods at their destination, even though it contemplated doing so through intermediate carriers, it assumed a liability of such character for every part of the route. Many cases hold that receiving goods marked for a point beyond the end of the receiving carrier's route is evidence of a contract to deliver them as marked.

In this case the bill of lading was executed in duplicate. In one of the copies the destination was left blank. In the other, the language was: "Received of Palmer and Pardee the following-described package, in apparent good order, marked and consigned as noted below, contents and value unknown, to be transported to Grant's Pass, Or., and delivered at the railroad depot at that point." Both copies in writing show that the goods were consigned to Pardee at Grant's Pass, Or. The negotiations as to the freight were, according to the uncontradicted testimony, with a view to prepayment all the way through. Hastings was only 24 miles from Grand Island, where the car was delivered to the Union Pacific; and the \$200 received by the railroad company, if not intended as a full prepayment of the freight to Oregon, was certainly intended to apply on the freight throughout the whole distance.

There is no possible view of the evidence from which it could be inferred that the railroad company had only contracted to deliver the goods to the next carrier.

3. The plaintiff in error seeks to avoid the effect of these constitutional and statutory enactments and judicial construction by pleading and arguing the effect of the act of congress known as the "Interstate-Commerce Law," and amendments thereto. The particular provision relied upon is from the act of 1889, as follows: "Any person or any officer or agent of any corporation or company who shall deliver property for transportation to any common carrier, subject to the provisions of this act, or for whom as consignor or consignee any such carrier shall transport property, who shall knowingly and wilfully, by false billing, false classification, false weighing, false representations of the contents of the package, or false report of weight, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent or servant, obtain transportation for such property at less than the regular rates then established and in force on the line of transportation, shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof, in any court of the United States of competent jurisdiction within the district within which such offense was com-

Interstate
commerce act.

mitted, be subject, for each offense, to a fine of not exceeding \$5000 or imprisonment in the penitentiary for a term not exceeding two years, or both in the discretion of the court."

Conceding that the construction of such acts into misdemeanors should render the contract contrary to public policy, to such an extent as to deprive the shipper of his remedy against the carrier, the evidence wholly fails to make out a case within the section quoted. Whatever false billing there may have been was by the company itself, as all the evidence shows that the agent knew before the car was moved after loading that it contained articles other than household goods. Under the most favorable construction of the evidence on behalf of the railroad company, if there was any false representation as to the contents of the "package," its true contents were known before the railroad company took charge of the car, and an agreement was made for the payment of any additional freight by reason of the introduction of drugs into the car.

We cannot see, therefore, how this section, conceding it to have the effect claimed for it by plaintiff in error, could affect the right of recovery. To give it such effect would be to declare that the section quoted absolutely protects a railroad company from liability in any case where the shipper uses general terms in describing the goods to the carrier or agent, and the agent paraphrases such language into a technical phrase, and such phrase does not correctly describe the goods, or where the carrier's agent, of his own volition, makes false statements of the character of the shipment. The section referred to was chiefly designed as a restriction upon the carrier. Its whole aim was to prevent false billing or false representation in order to conceal discriminations in favor of particular shippers. It was not intended, and should not be construed, as a means of relieving a carrier from liability because its own agents have committed an error.

But it is argued that, upon general grounds, the whole subject-matter of interstate transportation was by the constitution placed within the power of congress, and that congress, having enacted the Interstate-commerce Act, assumed such jurisdiction, and thereby nullified existing state laws; that not only the acts of congress must be treated upon these subjects, as the supreme law of the land, but that the decisions of the federal court must be accepted as the final statements of the law, prevailing against state statutes and state decisions. Without discussing the question as to whether the federal decisions are opposed to the constitutional and statutory provisions of this state, referred to, it is

Jurisdictions.

sufficient to say that we cannot accept the theory of the railroad company, as above outlined.

It is admitted in the pleading that the company is a corporation organized under the laws of the state of Nebraska. The time of this organization does not appear, but the statutory provisions date from the very earliest period of the state's history. The statute quoted above is a portion of the general incorporation act relating to railroads, the act under which this company derives its right to exist. To say that an act of congress—especially, one not, in express terms, contrary to these provisions—shall be given the effect of nullifying them, would be to say that this state must cease to exercise its sovereign powers of creating corporations for railroad purposes, else it must content itself with creating such corporations absolutely untrammelled by conditions, or permit them to exist subject only to such conditions as the congress of the United States may see fit to impose.

While this state forms a constituent part of the Union, under its present constitution, this court should never yield its consent to such a doctrine. If such be the law, it must be declared by another tribunal; and, in case it should be so declared, the exercise by the state of its sovereign power of creating such corporations should, from every motive of self-preservation, cease.

4. In addition to the general verdict rendered by the jury, there was an attempt to have certain special findings returned.

Sufficiency of findings. One of the errors assigned is the refusal of the court to mark upon the margin of the submission of those findings the word "given." If the submission of these findings amounted to an instruction, the objection would be purely technical, and the refusal of the court to use the word "given" could not operate to the prejudice of the plaintiff in error. Instead of marking the submission given, the court made a note as follows: "As I have said in the attached submission, I submit these special findings for you to pass upon; and, in the opinion of this court, it would be the grossest kind of error to attempt to control your discretion in passing on these special findings." There also appears to have been indorsed upon the questions submitted a quotation of that portion of the statutes whereby it is permitted to the jury, in their discretion, to return a general or special verdict.

Of the special questions submitted, the first related to the value of the goods at Hastings, and was answered. The second related to the value of the goods at Grant's Pass, Or., at the time when they should have been received there. In answer to this, the jury stated, "We do not know." The

other questions related to the freight rates under different circumstances. All these questions were answered, "We do not know." By the instructions, the jury was told that if it should find for the plaintiff the verdict should be for the market value of the goods at Grant's Pass, at the time they should have been there delivered, together with interest. The second question submitted was material to the case. The others were entirely immaterial, and the discharge of the jury without answering them was in no way prejudicial.

It is urged, however, that, when the jury answered that they did not know the market value of the goods at Grant's Pass, they, in effect, stated that they were unable to fix the measure of damages, and that the general verdict could not, therefore, have been founded on the evidence, and in obedience to the instructions. But, under the evidence given as to the value of the goods at Grant's Pass, no verdict less than that returned could be sustained. There is evidence tending to show that the value of the goods at Hastings was less than the value marked upon an inventory offered in evidence, and one witness testified that the goods were worth no more at San Francisco than at Hastings, but there is nothing to show that he even had any knowledge of the value at San Francisco. The only competent evidence of the value of the goods at Grant's Pass, Or., fixes it at more than \$7000; so that the verdict rendered could not have been affected by any findings based upon the evidence in answer to the special question submitted.

Some of the instructions do not state the law correctly. Some of them are apparently conflicting; but, in any view of the evidence, for the reasons already stated, no verdict different in character, or less in amount, could be sustained. The judgment is therefore affirmed.

RYAN, C., concurs. RAGAN, C., took no part in the consideration or decision of this case.

Validity of Stipulations Limiting Carriers' Liability to Particular Amount.—See *Louisville & Nashville R. Co. v. Wynn* (Tenn.), 45 Am. & Eng. R. Cas. 812, and note, 819; *Johnstone v. Richmond & Danville R. Co.* (S. Car.), 55 Am. & Eng. R. Cas. 346; see also note wherein cases are arranged by states, 35 Am. & Eng. R. Cas. 672.

Contracts between Shipper and Carrier—Mistake of Company in Rate Charged—Validity of Contract.—In *Borden v. Richmond & D. R. Co.*, 113 N. Car. 570, it appeared that the local freight agent of a railroad company made a written offer to ship merchandise at a certain price per 100 pounds, and that the shipper accepted the offer in writing; and it was conceded that the agent was authorized to make the proposal. It further appeared that complainant unequivocally expressed what he understood to be the price; that there was no misunderstanding between the shipper and the agent as to the terms of the contract, but that by an error in the transmis-

sion of the telegram from the general freight agent to the local agent, the rate per 100 was made to appear to be 20 cents less than the actual rate, and it was held that notwithstanding the mistake, the contract was binding on the company.

In *Chicago, R. I. & P. R. Co. v. Hubbell* (Kans.), Nov. 10, 1894, 38 Pac. Rep. 266, it was held that the fact that a special rate was offered to a shipper by mistake of the agent of one of two connecting lines of railroad could not give any added force to the contract of carriage, for a contract made by mistake can have no greater validity than one intentionally entered into.

In *Borden v. Richmond & D. R. Co.*, 113 N. Car. 570, it appeared that an agent of a railroad company and a shipper had made a written contract for the transportation of freight which erroneously stated the price per 100 for carriage to be 20 cents less than it actually was, and that the company subsequently exacted payment for the 20 cents, and it was held that the shipper who had paid the excess under protest was entitled to recover the same.

Connecting Lines.—In *Chicago, R. I. & P. R. Co. v. Hubbell* (Kans.), Nov. 10, 1894, 38 Pac. Rep. 266, it appeared that a joint tariff rate of \$2.70 per ton on shipments of coal between Richmond, Mo., and Mankato, Kan., had been agreed on, and was in force and in use, by the St. Joseph, St. Louis & Santa Fé Railroad Company, which operated a line from Richmond, Mo., to St. Joseph, Mo., and the Chicago, Rock Island & Pacific Railway Company, which operated a connecting line from St. Joseph, Mo., to Mankato, Kansas; that the agent of the first-named company by mistake quoted the plaintiff a rate of \$1.70 per ton on car-load shipments of coal from Richmond to Mankato, and that the plaintiff thereupon shipped 10 car loads, and it was held that the Rock Island Company was in no manner affected by such mistake, but was entitled to collect the full customary rate, there being no pretense that such rate is excessive or unreasonable.

Bills of Lading—Liability of Railroad Company as Affected by Interstate-commerce Act.—In *Merchants, C. P. & S. Co. v. Insurance Co. of N. A.*, 151 U. S. 368, it was held that there is nothing in the Interstate-commerce Act which vitiates bills of lading, or which, by reason of an allowance of rebates, if actually made, will invalidate a contract of affreightment or exempt a railroad company from liability on its bills of lading.

CHICAGO BURLINGTON & QUINCY R. Co.

v.

JONES.

(149 Illinois, 361.)

Constitutionality of act Prohibiting Exaction of more than Reasonable Charges by Railroad Company—Uncertainty.—Section 1 of the act of May 1, 1873 providing that if any railroad corporation shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers or freight, it shall be deemed guilty of extortion, etc., is not void for uncertainty in not defining the offenses for which the penalties provided for are imposed, since the courts in the absence of statutory regulation on the subject may decide what charges are reasonable; but construed with section 8 of the act which authorizes the

railroad and warehouse commissioners to fix a schedule of reasonable maximum rates for each of the railroads within the state, a uniform rule is furnished for the guidance of the companies.

Same—Delegation of Legislative Power.—Section 8 of the act is not unconstitutional as an attempted delegation of legislative power.

Same—Right to Trial by Jury.—The provision of the constitution making the schedule of the commissioners *prima facie* evidence that the rates therein fixed are reasonable maximum rates, is not unconstitutional as infringing upon the right of trial by jury, since the court is not deprived of a right to inquire into and determine the reasonableness of the rates established.

Same—Interference with Interstate Commerce—Separability of Valid and Invalid Provisions.—Although portions of the act forbidding unjust discrimination against shippers may be invalid as an interference with interstate commerce, yet the portion prohibiting the exaction of reasonable rates of carriage is not necessarily so, since the provisions upon the two subjects are separable so that those portions relating to the unreasonable charges may stand, even though those portions relating to unjust discrimination must fall.

Same—Impairment of Obligation of Contracts.—The portion of the act authorizing the commissioners to make a schedule of reasonable maximum rates is not obnoxious to the constitution, because impairing the obligation of the contract between a railroad company and the state as evidenced by its charter. *Adopting, Ruggles v. Illinois*, 108 U. S. 526.

Sufficiency of Proof of Publication of Schedule—Effect of Commissioners' Certificate.—A certificate of the commissioners attached to a schedule of rates purporting to have been made by the commissioners which certifies as to the publication of the classification and schedule as required by the act is admissible in evidence as *prima facie* proof that the schedule was that of the commissioners.

Same—Act of June 30, 1885.—Under the act of June 30, 1885, amending section 8 of the act, and providing that the schedule, when accompanied by the certificate of the commissioners that it is a true copy of a schedule prepared by them the production of the schedule and the certificate is sufficient to prove the authenticity of the schedule.

Limitation of new Cause of Action Introduced by Amendment of Declaration.—The original declaration counted specially on a statutory provision for the recovery of a penalty, and an amendment to the count made seven years thereafter was based on an alleged common-law liability, or on an implied contract to repay money obtained by wrongful overcharges. *Held*, that a recovery under the amended count was barred by the five years' statute of limitations.

APPEAL from Knox county circuit court.

This was an action in debt, brought by appellee, Charles L. Jones, against appellant, the Chicago, Burlington & Quincy Railroad Company, under the act of 1873, to recover penalties for alleged overcharges on shipments of live stock from points on appellant's road in this state to the Union Stock Yards, Chicago. The suit was brought in the circuit court of Knox county on October 17, 1882.

On May 25, 1883, appellee filed a declaration consisting of two special counts. The first count alleged that the railroad and warehouse commissioners made and published prior to

October 2, 1873, as required by law, a schedule of reasonable maximum rates for appellant; that appellee shipped over appellant's road, subsequent to that date certain cars of live stock from certain points on its road to Chicago; that appellant charged and received from appellee certain rates of freight, which were in excess of the rates fixed in the commissioners' schedule, whereby, by force of the statute, an action accrued to appellee, to recover three times the amount of the overcharge, and a reasonable attorney's fee. The second count was the same in form, except that it alleged a second schedule made and published by the commissioners prior to December 2, 1881, and certain shipments made, and freights charged and received, in excess of the commissioners' rates, subsequent to that date.

On June 9, 1883, appellant filed four pleas to the declaration. The first two pleas set out at length the corporate organization of appellant, and the several special charters of the different companies forming it, by consolidation; that, by these charters, appellant was given power by the legislature to fix its own rates of freight and fare; and that the statute under which the suit was brought was in violation of the obligation of the contract between it and the state. The third plea was *nil debet*; and the fourth, that the cause of action did not accrue within two years.

On June 11, 1883, the cause was removed to the circuit court of the United States, but on September 8, 1890, was remanded, and redocketed in the state court.

In February, 1891, appellee filed an amended declaration, which consisted of 191 special counts. All of these counts, except the last, declared on single shipments on different dates, and were the same in form. Each of the first 124 counts averred the making and publication by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for appellant prior to October 2, 1873,—the rate fixed by the schedule,—the rate charged, and the excess, and that thereby, by force of the statute, a cause of action accrued to the plaintiff for three times the alleged overcharge, and an attorney's fee. The remaining counts, except the last, were the same in form, except that they averred the making of a second schedule prior to December 2, 1881, and shipments subsequent to that date. The last count did not count on the statute, but averred certain shipments, and that the rates charged and received were unreasonable, and that thereby the defendant became indebted to appellee for the alleged overcharge above a reasonable rate.

To this declaration, appellant filed seven pleas. The first and second, to all the counts except the last, set up appel-

lant's charters, and the right claimed by it to fix its own rates, and that the statute sued on was a violation of the obligation of its contract with the state, substantially as in the first and second pleas to the original declaration. The third plea was *nil debet*. The fourth and seventh pleas, to all the counts except the last, averred that the causes of action alleged did not accrue within two years before the commencement of the suit. The sixth plea averred that the cause of action set out in the last count did not accrue to the appellee within five years before the filing, or obtaining leave to file, that count.

Appellee joined issue on the third, fourth, and seventh pleas, and filed a demurrer to the first, second, and sixth pleas, the fifth having been withdrawn. The demurrers raised two questions: (1) Whether appellant's first and second pleas, setting up its charter provisions, constituted a defense; and (2) whether the cause of action set up by the last additional count was a different cause of action from that declared on in the original declaration. The court sustained appellee's demurrer to the first and second pleas, and overruled his demurrer to the sixth. Issues were subsequently joined, and a trial was had by a jury.

On the trial, appellee gave evidence showing the various shipments made by him for two years prior to the commencement of the suit, and the amount of freight paid on each, and to establish that the rate charged was more than a reasonable rate, and the alleged overcharges, and gave in evidence (1) a schedule of maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated September 1, 1873, consisting of a classification of freight, and a tabulation of rates referring to this classification, with a certificate of the railroad and warehouse commissioners attached, as to the dates of publication; (2) a like schedule of reasonable maximum rates, purporting to have been made by the railroad and warehouse commissioners for appellant, dated December 1, 1881, also having a certificate of the railroad and warehouse commissioners attached, as to the dates of publication.

To the admission of these schedules in evidence, appellant objected, on the grounds, among others, (1) that the statute on which the suit was brought was unconstitutional and void; (2) that the provision of the statute making the commissioners' schedule *prima-facie* evidence of reasonable maximum rates was unconstitutional and void; (3) that the schedule was not published as required by the statute, and therefore never went into effect as a schedule.

Among the instructions asked by appellant, and refused by the court, were (1) an instruction that, under the pleadings and

evidence, the plaintiff was not entitled to recover; (2) an instruction that in arriving at their verdict the jury should disregard the schedule of September, 1873; (3) an instruction that in arriving at their verdict the jury should disregard the schedule of December, 1881.

The jury rendered a verdict in favor of appellee for \$2,868.60, and the court subsequently assessed appellee's attorney's fee at \$1,200. A motion for a new trial was entered, and overruled, and judgment was rendered in favor of appellee for the amount of the verdict and costs.

From this judgment, appellant has appealed to this court.

Herrick & Allen, for appellant.

J. B. Cessne and Willoughby & Barnes, for appellee.

MAGRUDER, J. (after the foregoing statement).—The questions presented by this record concern the validity of the system under which, for 20 years, or more, the rates of railroad charges for the transportation of passengers and freight have been controlled and regulated by this state, through the medium of a board of railroad and warehouse commissioners.

The principal points raised by the demurrers to the pleas, by the objections to the introduction of evidence, and by the refusal of instructions, relate to the constitutionality of the act of the legislature of this state approved May 2, 1873, in force July 1, 1873, entitled "An act to prevent extortion and unjust discrimination in the rates charged for the transportation of passengers and freights on railroads in this state, and to punish the same, and prescribe a mode of procedure and rules of evidence in relation thereto, and to repeal an act entitled 'An act to prevent unjust discriminations and extortions in the rates to be charged by the different railroads in this state for the transportation of freights on said roads,' approved April 7, A. D. 1871." 2 Starr & C. Ann. St. p. 1961; Rev. St. 1885, c. 114, p. 951, §§ 124–133.

Section 1 provides: "If any railroad corporation," etc., "shall charge, collect, demand, or receive more than a fair and reasonable rate of toll or compensation for the transportation of passengers and freight, * * * the same shall be deemed guilty of extortion, and upon conviction thereof shall be dealt with as hereinafter provided."

Section 6 provides: "If any such railroad corporation shall, in violation of any of the provisions of this act, ask, demand, charge, or receive of any person or corporation any extortionate charge, or charges for the transportation of any passengers, goods, merchandise, or property, * * * the person or corporation so offended against may, for each offense, recover

from such railroad corporation, in any form of action, three times the amount of the damages sustained by the party aggrieved, together with costs of suit and a reasonable attorney's fee, to be fixed by the court," etc.

Section 8 is as follows: "The railroad and warehouse commissioners are hereby directed to make, for each of the railroad corporations doing business in this state, as soon as practicable, a schedule of reasonable maximum rates of the charges for the transportation of passengers and freights, and cars on each of said railroads; and such schedule shall, in all suits brought against such railroad corporations wherein is in any way involved the charges of any such railroad corporation for the transportation of any passengers or freight or cars, or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as *prima facie* evidence that the rates therein fixed are reasonable maximum rates of charges for the transportation of passengers and freight, and cars upon the railroad for which said schedules may have been respectively prepared. Said commissioners shall, from time to time, and as often as circumstances may require, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to cause publication thereof to be made for three successive weeks in some public newspaper published in the city of Springfield in this state. All such schedules heretofore or hereafter made purported to be printed or published as aforesaid, shall be received and held in all such suits as *prima-facie* evidence of the schedules of said commissioners, without further proof than the production of the schedules desired to be used as evidence, with a certificate of the railroad and warehouse commissioners that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named, and that the same has been published as required by law, stating the name of the paper in which the same was published, together with the date of such publication."

First, the first ground upon which counsel for appellant attack the act is that it is void for uncertainty, in not defining the offenses for which the penalties provided for are imposed. The basis of this attack is found in the words: "If any railroad corporation," etc., "shall charge," etc., "more than a fair and reasonable rate," etc. It is said that it is uncertain what a fair and reasonable rate is, as the determination of that question will depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability, as affected by the value of the articles carried, the

volume of business, the amount of car-room required, the difficulty of the service, the special attention demanded, etc.; that the offense of charging more than a fair and reasonable rate can only be defined when the jury, in each particular case, shall decide from the evidence before them what is a fair and reasonable rate; that the statute, being penal in its character, should describe the offense in terms which are free from ambiguity; and that the enforcement of a statute whose meaning is thus doubtful violates that provision in the federal and state constitutions which declares that no person shall be deprived "of life, liberty, or property without due process of law." Const. U. S. Amend. art. 14, § 1; Const. Ill. art. 2, § 2.

The difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. If the legislature, in the act passed by it, fixes particular rates or charges, strict compliance therewith may work hardship, in view of the impossibility of always providing in advance for the effect of varying circumstances and conditions. The first section of the statute is merely declaratory of a well-known principle of the

common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation, upon receiving a reasonable hire (*Messenger v. Railroad Co.*, 36 N. J. Law, 407; *New England Express Co. v. Maine Cent. R. Co.*, 57 Me. 188), and the court was to judge of the reasonableness of the freight charges (*Gard v. Callard*, 6 Maule & S. 70; *Lowden v. Hierons*, 2 Moore, 102; *Baxendale v. Railway Co.*, 5 C. B. [N. S.] 330). As common carriers must carry all freight offered to them, and can only make a reasonable charge for so doing, it follows that the statute is only an expression of what was the law without the statute. Undoubtedly, the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges. (*Dow v. Beidelman*, 125 U. S. 680.) But in the absence of statutory regulation upon the subject the courts must decide what is reasonable. (*Dow v. Beidelman*, *supra*; *Munn v. Illinois*, 94 U. S. 113, 34 Am. & Eng. R. Cas. 322; *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31.) This being so, we are unable to see how the statute here deprives the appellant of its property without due process of law. If the legislature has failed to fix a reasonable rate, then the courts must decide for the railroad companies, when controversies arise, what is a reasonable rate. (*Chicago, etc., R. Co. v. Iowa*, 94 U. S. 155.)

But we held in *Chicago, etc., R. Co. v. People*, 77 Ill. 443,

that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making, by the railroad and warehouse commissioners, of a schedule of reasonable maximum rates for each of the railroad corporations in the state, furnished a uniform rule for the guidance of the railroad companies. In that case we said: "When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed. * * * It is true that the taking of higher rates than those fixed by the commissioners' schedule of rates, is not the exact form of statutory offense, and the taking of such higher rates might not subject to the penalties of the statute, upon the making of proof that they were fair and reasonable. Still, as we view it, to constitute the offense really designed and intended by the statute, regarding it in its whole scope and purpose, the rates taken must have been in excess of the schedule rates." This construction of the two sections, as related to each other, is not forbidden by the character of the act as a penal statute. Although penal laws are to be construed strictly, yet "the object in construing penal as well as other statutes is to ascertain the legislative intent." (U. S. v. Hartwell, 6 Wall. 395.) The statutory counts of the declaration in the case at bar contain an averment that a schedule of rates had been established by the board of commissioners, and that the defendant had received compensation in excess of those rates. It thus avoids the defect for which the declaration in *Chicago, etc., R. Co. v. People, supra*, was condemned.

Upon this branch of the case, counsel for appellant rely upon the case of *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. Rep. 679, 16 Am. & Eng. R. Cas. 1, decided by the circuit court of the United States, sitting in Tennessee; but a comparison of the statute of Tennessee which was under consideration in that case with the Illinois statute under which the present suit is brought will show that they differ from each other in many respects. In *Stone v. Trust Co.*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577, the supreme court of the United States passed upon the validity of a statute of Mississippi passed in 1884, and entitled "An act to provide for the regulation of freight and passenger rates in this [that] state, and to create a commission to supervise the same and for other purposes," which is similar, in many of the essential features, to the Illinois act of 1873. It was objected to the Mississippi act that it was void for want of sufficient certainty, and the case of *Louisville & N. R. Co. v. Railroad Commission, supra*, was referred to in support of the objection. But Chief Justice WAITE, in delivering the opinion of the court in

the Stone Case, says of the Mississippi statute : " It is difficult to understand precisely on what ground we are expected to decide that this statute is so inconsistent and uncertain as to render it absolutely void on its face. * * * We find nothing in it show that the statute, as it now stands, is altogether void and inoperative." (See, also, *Stone v. Railroad Co.*, 62 Miss. 607.)

We are not convinced that it is our duty to hold said act of 1873 void for uncertainty in defining the offense for the commission of which it imposes the penalties therein mentioned.

Second. It is claimed that the provision contained in said section 8 which authorizes the commissioners to fix for each of the railroads in the state a schedule of reasonable maximum rates is unconstitutional, as being an attempted delegation of legislative power.

The constitutional provisions on this subject are as follows :
 " And the general assembly shall, from time to time, pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state." *Delegation of legislative power.*

Const. art. 11, § 12 (1 Starr & C. Ann. St. p. 163).

" The general assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this state, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises." Const. art. 11, § 15 (1 Starr & C. Ann. St. p. 164).

The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies, and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of congress to regulate foreign and interstate commerce (*Munn v. Illinois*, 94 U. S. 113 ; *Chicago, etc., R. Co. v. Iowa*, *Id.* 155 ; *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31). This doctrine is not here controverted. It is admitted that if, in the act of 1873, the legislature had prescribed, in definite and specific figures, reasonable maximum rates of charges, the law would have been valid. By an act approved April 15, 1871, the legislature of Illinois classified the railroads in the state into four classes, and provided that those in the first class should be limited to

2½ cents per mile, those in the second class to 3 cents per mile, those in the third to 4 cents per mile, and those in the fourth class to 5½ cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage. Laws Ill. 1871, p. 640. We held this law to be valid (*Ruggles v. People*, 91 Ill. 256.) The supreme court of the United States affirmed the decision (*Ruggles v. Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49).

The objection made to the act of 1873 is that it is not such an act as was the act of 1871, which was repealed on March 31, 1874 (2 Starr & C. Ann. St. p. 2368). The act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates of charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held, in a number of cases, that statutes which create boards of commissioners, and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative, rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end; and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the legislature from the use of the agencies necessary to perform the duty imposed upon it by the constitution; in short, that the legislature may authorize others to do things which it might properly, but cannot conveniently, or advantageously, do itself (*State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281; *Railroad Co. v. Smith*, 70 Ga. 694, 9 Am. & Eng. R. Cas. 385; *Tilley v. Railroad Co.*, 5 Fed. Rep. 641, 1 Am. & Eng. R. Cas. 615; *Railway Co. v. Dey*, 35 Fed. Rep. 866; *State v. Fremont, etc., R. Co.*, 22 Neb. 313, 32 Am. & Eng. R. Cas. 426, 442; *Id.* 23 Neb. 117; *People v. Harper*, 91 Ill. 357, 8 Am. & Eng. Enc. Law, p. 911).

In *State v. Chicago, M. & St. P. Ry. Co.*, *supra*, the eighth section of the Minnesota statute, which was there held to be constitutional, provided that the railroad and warehouse commissioners should have the power, in case the tariffs of rates, fares, charges, or classification, filed and published by the railroad companies should be unreasonable, to change them, and make them reasonable, and compel the carriers to adopt them as thus changed, and, upon refusal, to enforce compliance by mandamus; and said section also declared that it should be unlawful for any common carrier to charge a higher

or lower rate than that fixed and published by the commission. In that case the supreme court of Minnesota interpreted the eighth section to mean that the rates recommended and published by the commission in the manner required by the act, were not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what were lawful or equal and reasonable rates, and that, in proceedings to compel compliance, no issue could be made or inquiry had as to the equality and reasonableness of the rates in fact. It was there conceded by counsel that the legislature could declare the schedule of rates fixed by the commission to be *prima facie* evidence of what was equal and reasonable, but the court held that the legislature had the power to create a commission whose judgment or determination as to what was reasonable should be final and conclusive. The Minnesota case was taken to the supreme court of the United States, and the judgment therein rendered was reversed upon the ground that the Minnesota statute, as construed by the supreme court of that state, conflicted with the constitutional provision forbidding the states to deprive persons of their property without due process of law (*Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285). In the latter case Mr. Justice BLATCHFORD, in delivering the opinion of the court, said of the statute: "It deprives the company of its right to a judicial investigation by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission, which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice." From this decision, Justices BRADLEY, GRAY, and LAMAR dissented, and held, in their dissenting opinion, that there was no good reason why the legislature might not delegate the duty of regulating and fixing the charges, so as to make them equal and reasonable, to such a board of commissioners as was provided for in the Minnesota statute.

Subsequently, in the case of *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31, the case of *Chicago, etc., Ry. Co. v. Minnesota*, *supra*, was reviewed and explained. The doctrine of *Munn v. Illinois*, *supra*, and of the other cases known as the "Granger Cases," in 94 U. S. 155-181, was adhered to; and it was held that the Minnesota law had been declared invalid because it had been construed by the supreme court of that state "as providing that the rates of charges for the transportation of property by railroads, recommended and

published by the commission, should be final and conclusive as to what were equal and reasonable charges, and that there could be no judicial inquiry as to the reasonableness of such rates."

We understand the doctrine of *Chicago, etc., Ry. Co. v. Minnesota, supra*, and of *Budd v. New York, supra*, to be as follows: The legislature has the power to directly fix the rates of charges. It has the right to declare what is reasonable. When it does so, its declaration is conclusive as to the reasonableness of the rates, and a charge beyond the maximum fixed by it might be regarded as unreasonable. But, where the legislature creates a commission to regulate the rates of charges, such commission has no power to make a schedule of rates which shall be final and conclusive evidence as to the reasonableness of the charges, because judicial inquiry is thereby cut off.

We do not, however, understand the federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it creates a commission with authority to make schedules which shall be *prima-facie* evidence of the reasonableness of the rates. Where the schedule is only made *prima-facie* evidence, the court, in a suit against the carrier, can inquire and determine what is a reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois act of 1873, which provides, in section 8, that the schedule made, published, and certified by the commissioners shall, in all suits brought against the railroad corporations involving their freight and passenger charges, etc., be "deemed and taken in all courts of this state, as *prima-facie* evidence that the rates therein fixed are reasonable maximum rates of charges," etc. One of the criticisms made upon the construction given by the supreme court of Minnesota to the statute in that state is expressed, in *Chicago, etc., Ry. Co. v. Minnesota, supra*, in the following words: "The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable." The Mississippi statute, which was held to be a valid law in *Stone v. Farmers' Loan & Trust Co., supra*, contained a provision that the determination of the commissioners should be received in the courts as *prima-facie* evidence that such determination was right and proper. So, also, the Iowa statute, which was held not to be unconstitutional as a delegation of legislative power in *Railway Co. v. Dey, supra*, provided that the schedule made by

the commissioners should be *prima-facie* evidence of the reasonableness of the rates therein charged, in all suits brought against the railroad corporations.

Under the constitutional provisions above quoted, the legislature of this state has the right, and it is its prerogative, if it chooses to exercise it, to pass a law establishing or fixing reasonable maximum rates of charges. When it passed the act of 1873 it did not choose to exercise the power thus conferred upon it. That act does not establish reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish such rates.

When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima-facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The legislature thereby merely refrains from the exercise of its constitutional power, and by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. The final tribunal of arbitrament is not the judiciary, but the legislature. But "when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common-law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable" (Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 462, 42 Am. & Eng. R. Cas. 285). The decision in Chicago, etc., Ry. Co. v. Minnesota, *supra*, does not base the invalidity of the Minnesota statute upon the ground that the provision making the schedule of the commission final and conclusive as to the reasonableness of the rates was a delegation of legislative power to the commission. Nor do we deem it necessary to decide whether such a provision would amount to a delegation of legislative power or not. But, if it be conceded that making the schedule of the commission final and conclusive as to the rates is a delegation of legislative power, it is sufficient to say, in the present case, that the act of 1873 does not give to the schedule any such final and conclusive effect. We are therefore of the opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel.

Third. It is urged that the provision of the statute making the schedule of the commissioners *prima-facie* evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right

Denial of
right of trial
by jury.

of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporations of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the next place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. (2 Rice, Ev. pp. 806, 807; Com. v. Williams, 6 Gray, 1; State v. Hurley, 54 Me. 562.) Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road *prima-facie* evidence of negligence, and no question has ever been raised as to the validity of the statute. (Railway Co. v. Campbell, 86 Ill. 443; Railroad Co. Funk, 85 Ill. 460; Railway Co. v. Larmon, 67 Ill. 68; Railroad Co. v. Rogers, 62 Ill. 346; Railroad Co. v. Clampit, 63 Ill. 95; Railroad Co. v. Quaintance, 58 Ill. 389.) Acts making tax deeds *prima-facie* evidence of the regularity of the proceedings antecedent to the deed have been held valid. (2 Rice, Ev. p. 607; Hand v. Ballou, 12 N. Y. 541; Delaplaine v. Cook, 7 Wis. 54; Allen v. Armstrong, 16 Iowa, 508; Wright v. Dunham, 13 Mich. 414; Gage v. Caraher, 125 Ill. 451.) See, also, Williams v. Insurance Co., 68 Ill. 387. Cases referred to by counsel, which involved the validity of acts providing for references to auditors or referees, and making the findings of facts by them in their reports *prima-facie* evidence of the facts in trials before juries, will be found to be clearly distinguishable from the case at bar. The supreme court of Iowa has decided that a provision as to the reasonableness of the charges is unconstitutional, because judicial inquiry is thereby cut off. We do not, however, understand the federal cases to hold that an act of a state legislature may not be valid, if, while omitting to itself fix the maximum rates, it creates a commission with authority to make schedules which shall be *prima-facie* evidence of the reasonableness of the rates. Where the schedule is only made *prima-facie* evidence, the court, in a suit against the carrier, can inquire and determine what is a reasonable rate; and the defect which was found to exist in the Minnesota law is thus obviated. Such is the character of the Illinois act of 1873, which provides, in section 8, that the schedule made, published, and certified by the commissioners shall, in all suits brought against the railroad corporations, involving their freight and passenger charges, etc., be "deemed and taken, in all courts of this state, as *prima-faci* evidence, that the rates therein fixed are reasonable maximum rates of charges," etc.

One of the criticisms made upon the construction given by the supreme court of Minnesota to the statute in that state is expressed, in *Chicago, etc., Ry. Co. v. Minnesota, supra*, in the following words: "The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable." The Mississippi statute, which was held to be a valid law in *Stone v. Trust Co., supra*, contained a provision that the making the schedule of the commission *prima facie* evidence of the reasonableness of the rates of charges, as contained in a statute of that state similar to the said act of 1873, was not obnoxious to the objections here urged against it, saying: "The provision of the statute that the rates fixed by the commissioners shall be regarded as *prima facie* reasonable is not of an unusual character, and was enacted in the exercise of the undoubted power of the state to prescribe rules of evidence in all proceedings under the laws of the state. The law presumes the acts of officers of the state to be rightfully done, and gives them faith accordingly. This rule is not unlike the provision of the statute complained of by the plaintiff." (*Railway Co. v. Dey*, 82 Iowa 312, 45 Am. & Eng. R. Cas. 391. See, also, *Chicago & A. R. Co. v. People*, 67 Ill. 11.)

Fourth—It is contended that the statute has been held to be unconstitutional as to interstate shipments, and that, therefore, it is void as a whole.

This contention is based upon the decisions of this court, in *People v. Wabash, St. L. & P. Ry. Co.*, 104 Ill. 476, 7 Am. & Eng. R. Cas. 628, and *Wabash, St. L. & P. Ry. Co. v. People*, 105 Ill. 236, and of the supreme court of the United States in *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, 57 Am. & Eng. R. Cas. 1. In the Illinois cases the action was to recover for unjust discrimination in carrying the same class of freight from Peoria to New York City for a less sum of money than similar freight was carried from Gilman to New York City; Peoria being a greater distance from New York than Gilman, and being 86 miles further west in Illinois upon the defendant company's road from a station near the eastern boundary of Illinois than Gilman. The judgments in the Illinois cases were reversed by the United States supreme court in the *Wabash, etc., Ry. Co. Case, supra*, because of the interpretation placed by this court upon those sections of the act of 1873 which relate to unjust discrimination, and not because the United States supreme court considered the act of 1873 invalid, as amounting

Interference
with interstate
commerce.

to an attempted regulation of commerce. The latter court, in the *Wabash, etc., Ry. Co. Case*, *supra*, said: "It might admit of question whether the statute of Illinois now under consideration was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state." The question whether the Illinois statute was or was not so designed by its framers was not as carefully considered in the above cases as it would have been, had it not been for the construction therein placed upon the previous decisions of the federal supreme court. The latter decisions were then understood as holding that a state law prohibiting unjust discrimination in the rates of charges for the transportation of property between points wholly within the state, whether it was a part of a continuous carriage to a point out of the state, or not, was not invalid, in the absence of congressional action upon the subject, and when construed as the act of 1873 was construed in the Illinois cases. With such understanding of the federal rulings, this court held that, while the provisions of the act of 1873 relating to unjust discrimination were inoperative upon that part of the contract of shipment which had reference to the transportation outside of the state, they were binding and effectual as to so much of the transportation as was within the limits of the state. In the opinion of the majority of the court (Chief Justice WAITE and Justices BRADLEY and GRAY dissenting) in *Wabash, etc., Ry. Co. v. Illinois*, *supra*, Mr. Justice MILLER said: "It cannot be denied that the general language of the court in these cases, upon the power of congress to regulate commerce, may be susceptible of the meaning which the Illinois court places upon it." In the same opinion the same learned justice, in speaking for the majority, while stating that they were bound by the construction given by this court to the Illinois statute, and that this court had so construed the statute as to make it apply to commerce among the states, also said: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states, there does not seem to be any difficulty in holding it to be valid." Looking, however, at the provisions of the act of 1873 which have reference to unjust discrimination, in the light of the construction given to them in the Illinois cases above referred to the federal supreme court held those decisions invalid, as applied to unjust discrimination in the rates of charges for the transportation of property within the state, when such transportation was part of a continuous carriage from a point within to a point without the state, upon the ground that such

construction made the provisions conflict with the constitutional grant to congress of power to regulate interstate commerce.

This court might be inclined to consider the question whether the construction announced in said cases and accepted by the United States supreme court, may not have been incorrect, and unauthorized by the language of the act, if the present suit had arisen under those sections of the act which have reference to unjust discrimination. But the case at bar arises under the provisions which prohibit the charge of more than fair and reasonable rates. This action is brought for damages growing out of alleged charges of unreasonable rates for the transportation of property between points lying wholly within the state, and not being part of a continuous transportation to any point outside of the state. It is within the power of the legislature to so amend the act as clearly to limit the provisions concerning unjust discrimination to commerce carried on within the state.

Counsel claim that the provisions relating to interstate commerce are so intimately connected with those relating to commerce carried on wholly within the limits of the state as not to be separable the one from the other, and that, as the act has been declared invalid when applied to interstate commerce, it must also be invalid as applied to state commerce. Upon this point reference is made to cases holding that words of limitation cannot be introduced into a penal statute, so as to make it specific, when, as expressed, it is general only. (U. S. v. Reese, 92 U. S. 214; Trade-Mark Cases, 100 U. S. 82; Baldwin v. Franks, 120 U. S. 678.) If the doctrine of these cases is applicable to the case at bar, it is only applicable to the sections of the act of 1873 relating to unjust discrimination; and the effect of its application would be to hold those sections void, as affecting transportation within the state, because they had been held void as affecting interstate transportation, but the effect would not be to invalidate the act, so far as it relates to charges of fair and reasonable rates alone.

Where a part of a statute is unconstitutional, the remainder will not be declared unconstitutional also, if the two are distinct and separable, so that the latter may stand, though the former becomes of no effect. The constitutional and unconstitutional provisions may sometimes be contained in the same section, but do not necessarily fall together, unless they "are essentially and inseparably connected in substance. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly inde-

pendent of that which was rejected, it must be sustained. * * * If a statute attempts to accomplish two or more objects, and is void as to one, it may still be, in every respect, complete and valid as to the other. * * * A legislative act may be entirely valid as to some classes of cases, and clearly void as to others." (Cooley, Const. Lim. (6th ed.) pp. 211, 213; *Dupee v. Swigert*, 127 Ill. 494.)

An examination of the act of 1873 in the light of these principles of construction will show that parts of the act relate to the prevention of unjust discrimination between persons and places in the rates of charges for transportation, while other parts relate to the prevention of charges that exceed fair and reasonable rates. Sections 2 and 3 of the act relate more particularly to unjust discrimination, and their aim is "against favoritism—against charging one shipper more than another for the like service under like conditions." *Railroad Co. v. Ervin*, 118 Ill. 250, 27 Am. & Eng. R. Cas. 8; *Illinois Cent. R. Co. v. People*, 121 Ill. 304. Section 1, in connection with sections 7 and 8, concerns the question whether the rate charged a passenger or shipper is reasonable, or not, irrespective of the charge that may be made against another passenger or shipper, or at another point. It is easy to see that there is a difference between extortion and discrimination. Hence, we think that the provisions of the act upon the two subjects can be separated and disconnected from each other so that those portions relating to reasonable charges may stand, even if those portions relating to unjust discrimination fall. Whether the latter do or must fall, or not, we do not decide. It is to be noted, however, that in *Railroad Co. v. Ervin*, *supra*, and *Illinois Cent. R. Co. v. People*, *supra*, this court treated the whole of the act of 1873 as valid as applied to commerce wholly within the state.

The *Wabash, St. L. & P. Ry. Co. Cases*, 104 Ill. 476, 105 Ill. 236, arose under the sections relating to unjust discrimination; and it was those sections which were therein construed as being "broad enough to include unjust discrimination in the rates of charges for the transportation of property from a point within to a point without the state." The provisions of the act relating to fair and reasonable rates were not construed as being broad enough to prohibit charges of more than reasonable rates for transportation outside of the state, or within it, as part of a carriage beyond the state. Therefore, the question whether these provisions were intended to apply only to transportation between points lying wholly within the state, and disconnected from a continuous carriage to a point outside of the state, is not a question which is settled in the decisions of the *Wabash, St. L. & P.*

Ry. Co. Cases. After a careful study of the terms of the act, we are of the opinion that the first section, read in connection with the title, and sections 7, 8, and 11, applies only to charges of reasonable rates for such transportation within the state as is not a part of a continuous transportation without the state, and therefore does not infringe upon the power of congress to regulate interstate commerce.

The title of the act is "An act to prevent extortion * * * in the rates charged for the transportation of passengers and freights on railroads in this state," and not on railroads outside of this state. The railroad corporations forbidden by section 1 to charge more than reasonable rates are thus therein described: "Any railroad corporation organized or doing business in this state under any act of incorporation, or general law of this state, now in force, or which may hereafter be enacted, or any railroad corporation organized, or which may hereafter be organized under the laws of any other state, and doing business in this state." Section 11 provides that the term "railroad corporation," contained in the act, shall be taken to mean all corporations, etc., now or hereafter owning or operating "any railroad, in whole or in part, in this state," and to apply to all persons, whether incorporated or not, "that shall do business as common carriers upon any of the lines of railway in this state," etc. Section 1 forbids the charging of more than reasonable rate for the transportation of passengers or freight or cars "upon any railroad within the state."

Section 8 directs the railroad and warehouse commissioners to make "for each of the railroad corporations doing business in this state" a schedule of reasonable maximum rates of charges for the transportation of passengers and freight and cars "on each of said railroads." It is quite manifest that the schedule thus required to be made is of more importance in determining what are reasonable rates of charges than in determining whether there has been unjust discrimination. In section 3 the discriminating rates, charges, etc., therein referred to are made *prima-facie* evidence of unjust discrimination, without mention of the schedule. If the greater distance (from Peoria to New York) and the shorter distance (from Gilman to New York) are given, and the fact is ascertained that the charge for transportation over such greater distance is less than the charge therefor over such shorter distance, a discrimination is at once established, whether the whole of the distances be regarded, or the proportional parts thereof in this state. Given the facts of the distances, whether without or within the state, and of the actual charges, and the question of discrimination is determined, though reference

to the schedule may be made as to the injustice of the discrimination to the individual. But it could not have been the intention of the legislature that this schedule should be *prima facie* evidence of what were reasonable maximum rates of charges for transportation outside of the state, or for such transportation within it as might be a part of a continuous transportation from within to without. Other states would have their own laws and commissioners, and methods of ascertaining rates. The railroad and warehouse commissioners named in schedule 8 are Illinois officials, appointed by the governor, with jurisdiction limited to this state, and without power or opportunity to gather the data for fixing reasonable rates of transportation outside of the state, or within the state, as connected with a continuous carriage to a point beyond its limits. The act establishing the board of railroad and warehouse commissioners provides that only railroads incorporated or doing business in this state shall make sworn statements of their affairs to said commissioners. 2 Starr & C. Ann. St. pp. 1956-1958. Section 7 of the act of 1873 requires the commissioner to ascertain whether the provisions of the act have been violated by "any railroad corporation in this state," and for that purpose "to visit the various stations upon the line of each railroad." We construe these features of the act to indicate that, so far as the provisions relating to the charges of reasonable rates are concerned, it was not the intention of the legislature to make them apply to any other kind of transportation than that which should occur wholly within the boundaries of this state, or to any other kind of contracts than those for a carriage which begins and ends within the state, disconnected from a continuous transportation through or into other states. Consequently, we hold the provisions relating to charges of reasonable rates to be valid.

Fifth, the statute granting power to the railroad commissioners to make a schedule of reasonable maximum rates for appellant is alleged to be a violation of appellant's charter, so as to impair the obligation of its contract with the state, and therefore the act is said to be void as to appellant.

Impairment
of obligation
of contracts.

This point is settled adversely to appellant by the cases of *Ruggles v. People*, 91 Ill. 256, and *Ruggles v. Illinois*, 108 U. S. 526, 11 Am. & Eng. R. Cas. 49. In the former case, one of the questions submitted by the stipulation was whether a law establishing a reasonable maximum rate of charges for the transportation of passengers on railroads in this state was such a constitutional law as appellant "was bound to obey, * * * notwithstanding the provisions of its charter;" and it was there held that the law was valid, and

that the legislature has the power to fix a maximum rate of charges for corporations exercising a business public in its character, and that such regulation does not impair the obligation of the contract in their charters. In *Ruggles v. Illinois*, *supra*, the provisions of appellant's charter are fully set out.

It is not denied that, by consolidation and statutory provisions, appellant acquired the powers and franchises granted to the Central Military Tract Company by an act to incorporate the latter company passed on February 15, 1851, and by an act to amend said act passed on June 19, 1852. By section 3 of said act of 1851, said company was thereby "created and incorporated for the purpose of organizing under an act entitled 'An act to provide for a general system of railroad incorporations,' in force November 5, 1849," and was "entitled to have and exercise the powers and privileges, and be subject to the liabilities therein enumerated." The general law of 1849, in clause 10 of section 21 thereof, conferred upon railroad companies organized thereunder the right "to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor; but such compensation for any passenger and his ordinary baggage shall not exceed three cents a mile, unless by special act of the legislature, and shall be subject to alteration as hereinafter provided." It also provides in section 32, that "the legislature may, when any such railroad shall be opened, for use, from time to time, alter or reduce the rates of toll, fare, freight, or other profits upon such roads; but the same shall not, without the consent of the corporation, be so reduced as to produce with said profits less than fifteen per cent per annum on the capital actually paid in; nor unless on an examination of the amounts received and expended, to be made by the secretary of state, he shall ascertain that the net income derived by the company from all sources from the year then last past shall have exceeded an annual income of fifteen per cent upon the capital of the corporation actually paid in."

Section 6 of the act of 1852 is as follows: "The said company shall have power to make, ordain, and establish all such by-laws, rules, and regulations as may be deemed expedient and necessary to fulfill the purposes and carry into effect the provisions of this act, and for the well ordering, regulating, and securing the affairs, business, and interests of the company: provided, that the same be not repugnant to the constitution and laws of the United States or of this state, or repugnant to this act. The board of directors shall have power to establish such rates of toll for the conveyance of persons or property upon the same, as they shall from time

to time, by their by-laws determine, and to levy and collect the same for the use of the said company. The transportation of persons and property, the width of track, and all other matters and things respecting the use of said road, shall be in conformity to such rules and regulations as the said board of directors shall from time to time determine."

It is now claimed by the appellant that it still has the right, under its original charter of 1851, of fixing rates, subject only to a limit of three cents a mile on passengers, and that the state has no power to interfere, except to keep the annual profits down to 15 per cent per annum on the paid-up capital, and that the act of 1873, giving the commissioners power to make a schedule of maximum reasonable rates for appellant, ignores these limitations upon the power of the state to regulate its charges. Although the act of 1852 is entitled "An act to amend the charter of 1851," it is a complete charter in itself. It contains provisions not found in the general railroad law of 1849. The plea alleges that it was accepted by appellant, and it was evidently intended and accepted as a substitute for the charter of 1851.

In *Ruggles v. Illinois*, *supra*, it was contended by appellant that the act of 1852 repealed sections 21 and 32 of the old charter, with the limitations therein contained as above set forth, and that under section 6 of the amending act of 1852, as above set forth, appellant could establish its own rates of fare and freight, free from legislative interference. In that case the supreme court of the United States declined to decide whether section 6 of the amending act repealed clause 10 of section 21 and section 32 of the original charter, or not. But they held that, under said section 6, no by-law could be established by the directors that did not conform to the laws of the state, whether such laws were in force when the amended charter was granted, or came into operation afterwards; that the power of the company for the regulation of its own affairs was, in express terms, subjected to the legislative control of the state; that the by-laws fixed the rates, and no by-laws could be made that was at all repugnant to the laws of the state; that only such charges could be collected by appellant as were allowed by the laws of the state; that, in the absence of legislation, the power of the directors over the rates is subject only to the common-law limitation of reasonableness, but that the state may establish a maximum of rates to be charged by railroad companies for the transportation of persons and property; that when a maximum is so established the rates fixed by the directors must conform to its requirements,—otherwise, the by-laws would be repugnant to the laws. Adopting the views thus expressed by the federal supreme

court, we are of the opinion that there is nothing in appellant's charter which relieves it from the obligation to submit to the provisions of the act of 1873 upon the subject of reasonable rates, and that the act does not impair the obligation of any contract alleged to be contained in appellant's charter.

Sixth, it is claimed that the schedule of 1873, which was admitted in evidence, was not published as required by statute, and that for that reason it did not go into effect.

The copy of the schedule of September 1, 1873, Commissioners' introduced by the plaintiff, was accompanied by certificate as evidence. the following certificate, which was attached to it:

"Office of the Railroad and Warehouse Commission, Springfield, Illinois.

"State of Illinois, Sangamon County, ss.:

"We, the undersigned, railroad and warehouse commissioners in and for the state of Illinois, do hereby certify that the foregoing is a true copy of 'A Schedule of Reasonable Maximum Rates of Charges for the Transportation of Passengers and Freight and Cars,' together with a classification of freight, explanatory, and forming a part, of said schedule, revised and prepared by the railroad and warehouse commission for the Chicago, Burlington and Quincy Company; that said 'Classification of Freight' and schedule has been published as required by law in the *Illinois State Journal*, a weekly newspaper published in the city of Springfield, in said state, in the issues of said paper dated, respectively, September 3d, 10th, 17th, and 24th, and October 1, A.D. 1873, as revised, and was in force from and after September 1, A.D. 1873, and remained in force until December 1, A.D. 1881.

"Witness our hands this 7th day of February, A.D. 1891.

"John R. Wheeler,

"Isaac N. Phillips,

"W. R. Crim,

"Railroad and Warehouse Commissioners.

"Attest: J. H. Paddock, Secretary."

This certificate shows that the publication of both the classification and the schedule was made, not only for three successive weeks, but for five successive weeks, and that, consequently, the provision in section 8 as to publication was fully complied with. The trial court was authorized to admit it, and, when admitted, it was "*prima-facie* evidence of the schedules of said commissioners." At the close of plaintiff's evidence the defendant introduced another certificate of the commissioners, dated December 1, 1891, and other evidence, for the purpose of showing that the classification of freights, which recited on its face that it formed a part of each schedule, was published on September 3d, 10th, and 17th,

and that the schedule for appellant, which refers to the classification as forming a part of it, was published on September 17th and 24th, and October 1st. The classification was published three successive weeks, and the schedule was published three successive weeks; but the point is made that, as the schedule referred to the classification the latter was a part of the former, and that when the schedule was published, on September 17th, 24th, and October 1st, the classification should have been published, as a part of it, and in the same issues of the newspaper with it. As the classification was for all the railroads, and a schedule was made for each, it is a question whether it was necessary to republish the classification with each schedule, it having already been published for the time required by law. The classification was on file in the office of the commissioners, and the schedules referred to it, and the roads could have access to it.

The certificate, however, as above set forth, was merely *prima-facie* evidence that the schedule introduced was that of the commissioners. Other evidence might be introduced to show that it was their schedule. This evidence was furnished by the defendant itself. Its own proof showed that the copy introduced was a copy of the schedule prepared and adopted for it by the commissioners. It is not contended that the defendant did not have notice of the schedule of September, 1873, irrespective of any publication of it.

But even if it be true that the schedule could not go into effect until it was published in the manner required by the law, and that the separate publication of the classification and the schedule was not in compliance with section 8, we still think that the certificate above set forth was sufficient. The case below was not tried until November 30, 1891. By act approved June 30, 1885, the legislature amended said section 8, and in the amended section provided as follows: "All such schedules heretofore or hereafter made shall be received and held in all such suits as *prima facie* the schedules of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of the railroad and warehouse commissioners, that the same is a true copy of a schedule prepared by them for the railroad company or corporation therein named." (3 Starr & C. Ann. St. p. 1029.) The certificate of February 7, 1891, conforms to the requirement of section 8, as thus amended.

No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens, and do not constitute a part of any contract. They are subject to control and modification by the legisla-

ture, whether affecting proof of existing rights, or rights subsequently acquired. Changes in them may be made applicable to existing causes of action. (Cooley, Const. Lim. (6th ed.) p. 451; Gage v. Caraher, 125 Ill. 447).

Seventh.—Appellee assigns as a cross error the overruling of his demurrer to the sixth plea of the defendant. This plea was to the last additional count of the amended declaration,

Amendment of
declaration—
Limitation of
actions.

and averred that the causes of action therein set out did not accrue to the plaintiff within five years next before the filing, or the obtaining of leave to file, said last additional count, or the substitute therefor. The question is whether the amendment, or the last count of the amended declaration, sets up a new cause of action. If it does, the demurrer to the plea was properly overruled. If it does not, the amendment takes effect from the commencement of the suit. When an amendment sets up no new matter or claim, but merely restates in a different form the cause of action set out in the original declaration, it relates to the commencement of the suit, and the statute of limitations is arrested, at that point; but, where the amendment introduces a new or different cause of action, it is treated as a fresh suit, begun at the time when such amendment is filed, and the statute is arrested at the latter date. (Baker v. Railway Co., 34 Mo. App. 98.)

In this case the two counts of the original declaration, and all the additional counts of the amended declaration, except the last, sought to recover the treble damages allowed by the statute for a violation of its provisions; and to these counts the two-years statute of limitations was properly pleaded, as, in this state, actions for a statutory penalty must be brought within two years next after the cause of action accrued. The last amended count, filed more than seven years after the filing of the original declaration, sought to recover damages for the violation of defendant's common-law liability as a carrier for charging more than reasonable rates. To this count the five-years statute of limitations was applicable. It is conceded by appellee that he cannot recover treble damages for unreasonable charges, except for those paid by him during the two years prior to the beginning of the suit, and that the object of the amended count is to recover single damages for the three years immediately preceding the two years for which treble damages are claimed.

We think that the amended count introduced a new cause of action. The original declaration declares specially on the statute for the recovery of a statutory penalty; alleges, on the ground of action, the charge of rates in excess of those fixed by the schedule of the commissioner, and concludes

“Whereby, and by force of the statute, * * * an action hath accrued * * * to demand and recover of the defendant three times the amount of said sum of money,” etc., “with reasonable attorney’s fee, in a sum to be fixed by the court.” The amended count is based on an alleged common-law liability, or on an implied contract to repay money obtained by wrongful overcharges. Before it was filed the cause of action set forth in it had been barred by the five-years statute of limitations. If a new suit had been begun for the same cause of action at the time of the amendment, it could not have been maintained, and there is no more reason why the cause of action should be enforced when embodied in an amended declaration than when forming the subject-matter of a new suit. Although an amendment may properly be allowed, it does not necessarily, when allowed, have the effect of relating back to the date of bringing the suit, for the purpose of determining questions of limitation. An amendment which introduces a cause of action barred by limitation is ineffectual to avoid the statutory bar. (*Gibbons v. The Fanny Barker*, 40 Mo. 253; *Baker v. Railway Co.*, *supra*; *Gorman v. Judge*, 27 Mich. 138; *Melvin v. Smith*, 12 N. H. 462; *Illinois & St. L. R. & Coal Co. v. People*, 19 Ill. App. 141).

Where the original declaration sets up overcharges upon certain shipments, and the amended declaration sets up overcharges on other and different shipments, the causes of action are not the same. (*Railroad Co. v. Cobb*, 64 Ill. 140; *Phelps v. Railroad Co.*, 94 Ill. 548; *Rolling-Mill Co. v. Monka*, 107 Ill. 340.) Here the original declaration seeks to recover penalties for overcharges on shipments made subsequent to November 2, 1880, while the last additional count of the amended declaration declares for damages on account of overcharges on shipments made prior to October 17, 1880.

We are of the opinion that there was no error in overruling the demurrer to the sixth plea.

One or two other minor objections are urged, but, after a careful consideration of them, we are satisfied that they are not well taken.

The judgment of the circuit court is affirmed.

Judgment affirmed.

Statutory Prohibition of Overcharges.—See *Osgood v. Concord R. Co.* (N. H.), 21 Am. & Eng. R. Cas. 44, and note 47.

Power of State to Regulate Rates for Transportation.—See *Chicago & Grand Trunk R. Co. v. Wellman* (U. S.), 49 Am. & Eng. R. Cas. 1, and note 7.

Action by Shipper to Recover for Overcharges.—See *Cook v. Rock Island & Pac. R. Co.* (Iowa), 45 Am. & Eng. R. Cas. 291, and note 299. See note to *Hoover v. Pennsylvania Co.*, *post*, 126.

Constitutionality of Act Prescribing Maximum Freight Charges—*Exemption of Roads Built and to be Built.*—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., Dist. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that an act prescribing maximum rates for transportation of freight by railroads within the state, which exempted from the operation of its provisions, railroads built since a certain date, or which might be built before another date, and until such last-mentioned date was not obnoxious to the fourteenth amendment to the constitution of the United States, because denying the equal protection of the laws.

Compliance with Constitutional Requisites.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., Dist. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that an act (Newberry bill, Laws 1893, ch. 24, p. 164), which prescribes the maximum rates for the transportation of freight by railroads within the state, and which appears to have been duly filed in the office of the secretary of state, to have been attested by the signatures of the speaker of the house and his chief clerk as well as by the signatures of the president of the senate and its secretary, which is endorsed with approval of the governor, and bears a certificate of the chief clerk of the house of representatives as to its origination in one house and its passage in another, will be regarded as a valid act by the courts of the United States in the absence of any special provision in the state constitution or any decision of the supreme court of the state which requires a looking beyond these evidences of authenticity, especially where the journals of the legislature affirmatively show that everything was done which the constitution required to be done in the due passage of a bill. *Following Field v. Clark*, 143 U. S. 49.

Authority of State to Regulate Freight Charges Within the State.—In *Board of Railroad Com'rs v. Symms Grocer Co.* (Kan., Jan. 6, 1894), 35 Pac. Rep. 217, it was held that it is well settled that it is competent for a state legislature to establish rates and classifications to be charged by railroad companies for the transportation of passengers or freight between points on their line within the state, and that this power may be largely delegated to boards of commissioners. *Citing Munn v. Illinois*, 94 U. S. 113; *Chicago, etc., Ry. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285; *Budd v. New York*, 143 U. S. 517, 36 Am. & Eng. Corp. Cas. 31.

Effect of Establishment of Classification by Competing Lines.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that the voluntary act of railroad companies in establishing a uniform classification for certain territory does not limit the power of the state to establish a different classification.

Reduction of Local Rates as an Interference with Interstate Rates.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that the reduction of local rates by state legislation is in no sense an interference with interstate rates.

Right of State to Control Road Organized Under Act of Congress.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that the mere fact that a railroad corporation was organized under the laws of congress does not exempt it from state control in respect to rates for local freights in the absence of anything in the statute under which it was organized indicating an intention on the part of congress to wholly remove such corporation from such control. *Citing Reagan v. Trust Co.*, 154 U. S. 413.

Construction of Act of Congress Creating Union Pacific R. Co.—Reservation by Congress of Right to Amend Act.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., Dist. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that the act of congress (12 Stat. at large 497), creating the Union Pacific R. Co., and which (in section 18) reserves the right to congress to fix and establish

the rates of fare for said road whenever the net earnings shall exceed a certain percentage, taken in connection with another provision in the same section likewise reserving to congress the right to "add to, alter, amend or repeal" the act, is not sufficient to show an intention on the part of congress to reserve to itself, as it had the power to do, sole and absolute control over the rates charged by the company.

Regulation of Freight Charges by State—Effect of Non-compliance with Self-operative Statute by Commissioners.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that under a statute providing that an original schedule of rates and classification of freights on all lines of railroad within the state shall be fixed, and shall go into effect within 60 days from the time the act takes effect, no action on the part of the commissioner is necessary, and the fact that they were enjoined from publishing the notice provided for by the statute, or the fact that the railroad companies did not record the schedule and classification as in force, would not tend to defeat the operation of the schedule and the classification.

Necessity of Publication of Schedules as Required by Statute.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that under a statute authorizing railroad commissioners to regulate freight charges, there can be no change in existing classification and rates which will be effective until a publication thereof as required by statute.

Admissibility of Schedules in Evidence.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that under a statute making schedules of freight rates established by railroad commissioners *prima facie* evidence, a schedule made in conformity with law, the identity of which is not questioned, is admissible in evidence, notwithstanding the informality or insufficiency of a certificate required by the statute and attached thereto.

Sufficiency of Authentication of Schedule.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that under a statute providing that schedules of rates by railroad commissioners shall be received in all suits as *prima facie* evidence that they are the schedules of such commissioners without further proof than the production of the schedule desired to be used in evidence together with the certificate of the commissioner that the same is a true copy of the schedule prepared by them, and that notice of making the same has been published as required by law, such a certificate signed by the secretary of the commissioners in his official capacity by their order, and having attached thereto the seal of the commission, is sufficient to justify its admission in evidence, especially in view of the fact that the statute further provides for the selection of a secretary by the board of commissioners, and requires them to provide a seal which "shall be judicial notice."

Official Report of Railroad Companies as Evidence in Proceedings for Violation of Statute.—In *Atchison T. & S. F. R. Co. v. Richardson* (Kan., March 10, 1894), 35 Pac. Rep. 1114, it was held that the annual report of the board of railroad commissioners, made to the governor, is not, of itself evidence of the facts therein stated with reference to the ownership and operation of a line of railroad, but the official reports made by the railroad companies, under oath, to the board of railroad commissioners, and required by law to be filed with them, or copies thereof duly certified by the secretary of the board, are competent evidence against the company making them.

Who may Enjoin Action by State Railroad Commissioners.—In *Board of Railroad Com'rs v. Symns Grocer Co.* (Kan., Jan. 6, 1894), 35 Pac. Rep. 217, it appeared that the board of railroad commissioners made a finding and decision reducing rates of freight upon car-load lots of sugar, coffee,

beans, and canned goods, making them considerably less than the rates upon the same commodities when shipped in less than car-load lots, that a shipper, whose business mostly required the use of the rates fixed for less than car loads, and who claimed that the proposed rates would operate to his injury and to the benefit of other shippers who would use the car-load rates, brought an action against the board to enjoin it from promulgating and putting in force the new schedule of rates, contending, not that they were unreasonably low or unremunerative to the carrier, but that the enforcement of them, without making a reduction of the rates for the shipment of smaller quantities, was a discrimination against him which should be enjoined, and it was *held* that the plaintiff had no such interest as entitled him to enjoin the board from putting in force its finding and decision, and that he was not entitled to the relief demanded. The court said: "Every shipper, and, indeed, every purchaser, of the commodities shipped under the schedule established will be more or less affected by it. It is a matter of public concern, and a private individual cannot invoke the extraordinary remedy of injunction unless he has some personal and peculiar interest not shared by the public. As has been said: 'It is not enough that his damages are greater than those sustained by the general public, thus differing only in degree; but they must be different in kind.' *Commissioners v. Smith*, 48 Kan. 383, and cases cited. The Symns Grocer Company may, by virtue of its larger facilities, be affected in a greater degree than other shippers in the state, but the injury, if there be one, does not differ in kind from that suffered by other shippers throughout the state who may utilize the rate in the transportation of merchandise. The matter, then, being a question of public interest, decided by a public *quasi* judicial tribunal, it would seem that a private shipper could not maintain an action to enjoin the announcement and enforcement of the decision of the board; but if, for any cause, an action would lie, it should be brought in the name of the state on the relation of some public officer."

HOOVER *et al.*

v.

PENNSYLVANIA R. Co.

(156 Pa. St. 220.)

Right of Railroad Company to Make Discriminating Freight Charges.—Railroad companies have no right to make any undue discrimination or preference in their charges for the same service under like circumstances.

Construction of Act of June 4, 1883, Prohibiting Undue or Unreasonable Discrimination.—A charge of a lower rate of freight for transporting coal to a manufacturing establishment, from which the railroad obtains goods for transportation, than to a coal dealer whose business with the company is limited merely to the transportation of coal does not constitute a violation of the act of June 4, 1883, prohibiting undue or unreasonable discrimination, since the prohibited discrimination is limited by the consideration that it must be "for a like service from the same place upon like conditions and under similar circumstances."

Same—Equality.—The equality prescribed by the act is an equality in

the sense of freedom, from unjust or unreasonable discrimination, and not a strict and legal equality, under all the circumstances, however varying and different.

Same—Effect of Sale of Coal to Employees by Manufacturing Company Enjoying Special Rate.—The fact that the manufacturing company, enjoying a reduced freight rate, sold some of its coal to its employes without the knowledge of the railroad company will not render the railroad company liable as for an unlawful discrimination where it does not appear that the coal dealer was damaged by such sales.

Same—Duty of Railroad Company on Acquiring Knowledge of Sales.—When the railroad company acquires knowledge of the sales by the manufacturing company to its own employes, its duty is to abrogate the agreement for the reduced rate, and insist on the same rate as it charges to other dealers, or it will incur the penalty for an unjust discrimination.

Action to Recover Treble Damages under Act of June 4, 1883—Province of Court and Jury.—In an action to recover treble damages under the act of June 4, 1883, for an alleged unlawful discrimination, whether or not the established facts of the case are within the act, is a question of law for the court, and not a question of fact for the jury.

Same—Measure of Damages.—In an action under the act of June 4, 1883, allowing recovery against a railroad company making an illegal discrimination in freight rates of "damages treble the amount of injuries suffered," the injured party cannot recover three times the amount of the difference between the charges, unless the amount of the difference is actually equal to the 'amount of injury suffered,' and in such a case proof as to the actual damages must be clear and defined.

Secret Lawful Discrimination.—Where a rebate does not of itself constitute an illegal discrimination, the mere fact that the parties to it kept it secret will not render it unlawful.

Presumption of Court as to Acquaintance with Custom.—Where it appears that differences in freight rates for coal to manufacturers and to mere dealers have been for many years in universal practice, and that no case except the one at bar has reached the courts of last resort in this country or in England questioning the legality and propriety of such differences, the court will assume that the practice has been assented to both by the professional and the lay mind.

Constitutionality of Act of June 4, 1883—Special Legislation in Regulation of Trade.—The act of June 4, 1883, does not conflict with act 3, § 7, of the state constitution, which prohibits special legislation regulating labor, trade, mining, or manufacturing.

APPEAL from Huntingdon County court of common pleas.

David W. Sellers and *W & J. D. Dorris*, for appellant.

George B. Orlady, for appellees.

GREEN, J.—The third section of the seventeenth article of the constitution of 1874 is in the following words:

"Sec. 3. All individuals, associations, and corporations shall have equal right to have persons and property transported over railroads and canals, and no undue or unreasonable discrimination shall be made in charges for, or in facilities for, transportation of freight or passengers within the state, or coming from or going to any other state. Persons and property transported over any rail-

Case stated.

road shall be delivered at any station, at charges not exceeding the charges for transportation of persons and property of the same class, in the same direction to any more distant station; but excursion and commutation tickets may be issued at special rates."

For the purpose of enforcing the foregoing provision of the constitution, the legislature enacted the law of the 4th of June, 1883 (P. L. 72). The first and second sections are as follows:

"Section 1. That any undue or unreasonable discrimination by any railroad company or other common carrier or any officer, superintendent, manager, or agent thereof, in charges for or in facilities for the transportation of freight within this state, or coming from or going to any other state is hereby declared to be unlawful.

"Section 2. No railroad company or other common carrier engaged in the transportation of property shall charge, demand, or receive from any person, company, or corporation, for the transportation of property, or for any other service, a greater sum than it shall receive from any other person, company, or corporation for a like service from the same place upon like conditions and under similar circumstances; and all concessions in rates and drawbacks shall be allowed to all persons, companies, or corporations alike for such transportations and services, upon like conditions, under similar circumstances and during the same period of time. Nor shall any such railroad company or common carrier make any undue or unreasonable discrimination between individuals or between individuals and transportation companies, or the furnishing of facilities for transportation. Any violation of this provision shall make the offending company liable to the party injured for damages treble the amount of injury suffered."

The action in the present case was brought to recover treble damages, under the second section of the act of 1883, for an alleged unjust and unreasonable discrimination against the plaintiffs in charges for freights on coal shipped from Snow Shoe to Bellefonte, within this state, over lines of railroad owned or controlled by the defendant company.

The period of time covered by the claim of the plaintiffs was from September, 1889, to April, 1891, and it was alleged that the plaintiffs were overcharged 20 cents per ton on 10,607 tons carried over the defendant's road during the time named. Substantially the defense set up by the defendant was that in the year 1881 certain citizens of Bellefonte and vicinity, having in contemplation the erection of a manufacturing plant at Bellefonte for the manufacture of nails, waited upon the de-

fendant company, through Gov. A. G. Curtin who represented them, and endeavored to make, and did make, a special contract that if the plant was erected the company should not charge them more than 30 cents per ton for all coal shipped from Snow Shoe to the works at Bellefonte; that such contract was made, and the plant was then erected, and the manufacture of nails thereat was carried on from 1881 until and after the time covered by the plaintiffs' claim; that the plaintiffs were coal dealers only, who merely bought and sold coal, and returned no freight to the defendant as the product of any manufacturing operations; that they did not do any business as coal dealers, in fact, did not come into existence, until the year 1889, eight years after the nail company was organized and commenced business, and while the defendant company was subject to, and bound by, the terms of their contract with the nail company; and that the plaintiffs were not discriminated against at all, because they were charged only the same freights as were charged to all others who were coal dealers only, and it was contended, as matter of law, by the defendant, that the discrimination in the rates of freight between the nail company and the plaintiffs was not, in view of all the circumstances of the case, an undue or unreasonable discrimination, within the meaning of the constitutional provision or of the act of 1883. In reply to points put to the court on the trial on this subject the learned judge who tried the cause charged the jury that the question of unjust discrimination was a question of fact to be determined by them, and he refused the defendant's point on that subject; but he did, nevertheless, also instruct the jury, as matter of law, that the distinction between a dealer and a manufacturer, set up by the defendant, was not a defense, and would not exempt the defendant from the penalties of the act of 1883. He said: "The defense claim, as an exemption from the penalty of this act, the fact that the one may be classed as a manufacturer, and the other simply as a dealer. I do not regard the law as making that classification. I think that the classification which the act of 1883 intended was a classification relating to the carriage, and not to the shipper himself. It may charge more for one kind of freight than for another. It may charge more for live freight than for wood, coal, iron, or ore. It may charge more for a certain portion of its road than it does for others. These things are governed largely by the expense to which the common carrier is subjected. Common carriers may charge more when they ship but a small quantity than they do when they ship by wholesale. * * * But I do not think the law, or the policy of the law, permits them to classify the kind of dealer; that is, that they may make a discrim-

ination between the character of the consignor or consignee ordinarily. * * * The evidence here is that each shipment was by car loads, during the same period of time, and under like circumstances. The fact that one party was a manufacturer and the other party were coal dealers we think is not material in this case."

The same idea was repeated, and a positive instruction was given, that, upon the facts stated in the plaintiffs' point, "the service and conditions were alike, and the circumstances the same." We regard this as a binding instruction to the jury upon the law of the case, which left them no discretion but to find for the plaintiffs; the only question for them being the amount of damages to be found.

After a very patient examination of all the testimony and of all the authorities cited on both sides, we find ourselves unable to agree with the learned court below, either as to their interpretation of the law or their judgment upon the facts.

So far as the law of the case is concerned, there is no doubt that the act of 1883 does not prohibit all discrimination. It prohibits only discrimination which is undue or unreasonable,

and the prohibited discrimination is further limited by the consideration that it must be "for a like service, from the same place, upon like conditions, and under similar circumstances." If, therefore,

the discrimination in a given case is upon conditions which are not alike, and circumstances which are not similar, the act is inapplicable, and its penalties are not incurred. Nor can we regard this question as a question of fact for the jury alone. The ascertainment of the actual facts of the case, of course, is for them, but where these are established by undisputed testimony, or are presented by proper points which cover the facts in evidence, the resulting question is whether the facts established, or undisputed, or exhibited in properly-drawn points, bring the case within the operation of the words or necessary meaning of the statute; and that, of course, is a question of law for the court, for the question then is one of interpretation. Do the words of the statute extend to and embrace the established facts of the case, or do they not? If they do not, the statute is not applicable; if they do, it is, and the court alone, as in all other similar cases, must determine that question. It is beyond the function of the jury.

Let us now recur to the well-established and the undisputed facts of the case, and inquire whether there are any, and, if so, what, differences in the conditions and in the circumstances which attended the shipping of the coal to the plaintiffs and to the Bellefonte Iron & Nail Company, respectively.

In the first place, we find the undisputed testimony of Gov.

Curtin to the effect that in 1881, and prior to the erection of the nail works, he called upon the defendant's officials, for the purpose of having them agree to carry the coal for the prospective works at 30 cents per ton. This testimony is clear, distinct, positive, and entirely uncontradicted, and it was followed by proof that the contract was carried out by the defendant after some delay in the adjustment. Gov. Curtin said: "I went to Philadelphia for the purpose of having the arrangement made. I there saw Mr. Creighton, who was the freight agent of the Pennsylvania Railroad Company, and, after some time in negotiating, he agreed that the freight should be reduced to thirty cents per ton where the amount consumed per day was twenty tons or more. He wrote me a letter, in which it was settled and fixed at 30 cents per ton." He then explained the loss of the letter, and his search for it, and said: "But of the contents of the letter I am perfectly clear in my recollection of it, and it was one of the inducements which contributed to the erection of the nail works in this place. There were other parties in this place engaged in other industries which would have had a right to the reduction, notably Valentine's works in operation, and the glass works, when they used the quantity indicated."

As the court below charged directly against any effect being attached to the subject-matter of this testimony, the defendant is entitled to have it regarded as proof of an established fact; and, this being so, we have the following differences in the conditions and circumstances attending the shipments to the plaintiffs and the nail works, respectively:

(1) The defendant, when it began carrying coal for the plaintiffs, in September, 1889, was bound by the terms of a contract made with the nail works eight years before, and during all the intervening time the plaintiffs were not even in existence as a firm, and were doing no coal business whatever. We know of no reason why that contract was not binding on the defendant, especially as Gov. Curtin testified, without contradiction, that all the other industries at Bellefonte were entitled to the benefit of it, if they took the requisite quantity of 20 tons daily. This being so, the defendant's hands were tied, and it could not charge the nail works 50 cents a ton if it had desired to do so. This constituted a most material difference in the conditions and circumstances of the shipments. In an action by the nail works to recover the 20 cents a ton higher charge, if it had been made, to equalize it with the rate charged to the plaintiffs, it would have been no defense to say that a company of coal dealers had lately come into existence who were getting coal over the

same road from the same point, and therefore the defendant would be obliged to charge 50 cents per ton thereafter.

(2) The nail works were bound to take 20 tons every day, while the plaintiffs were under no such obligation.

(3) The plaintiffs were dealers in coal merely, while the nail company was a manufacturer of fabrics, and itself consumed the coal it received. They were therefore not competitors in the same business, and a lower rate to the manufacturer would not, under the contract, affect the business of the plaintiffs injuriously. It is true there was proof that the nail company did sell some coal to their own workmen, but, as it is not shown that the defendant had any knowledge of this fact, they cannot be held responsible for it.

(4) The business of the plaintiffs paid but one freight to the defendant, while the business of the nail company paid not only that freight, to wit, for hauling the coal to the nail works, but also, in addition to that, another, and entirely independent, freight, to the defendant on all the products manufactured by the nail company. This was a most important and vital difference in the conditions and circumstances of the two shipments. The authorities are very clear and strong that where an additional freight is obtained by means of the lower charge, the discrimination is justified, both at common law and under the statutes.

The importance of this factor in the discussion is at once manifested by certain testimony given by the plaintiffs, through one of their witnesses, L. E. Munson, who was the superintendent of the Bellefonte Iron & Nail Company. On examination by counsel for the plaintiff he was asked: "Question. What did you say the capacity of the nail works was as to outgoing freight? Answer. About thirty tons a day; thirty or forty tons a day. Q. That would be three hundred kegs, would it? A. We have a capacity of five hundred kegs. Q. What was your outgoing freight? A. I suppose part of the time we made a hundred thousand kegs a year; from seventy-five to one hundred and twenty-five thousand kegs a year. Q. Would that mean about one car a day on a three-hundred kegs basis? A. Yes, sir. Then we shipped considerable muck-bar. Q. Were you shipping muck-bar at the time you were shipping nails? A. Sometimes; when we were making nails out of steel rods. Q. Were you making muck-bar at the time, you were making nails? A. Yes, sir. Q. Were you making bar iron, and shipping it, at the time you were making nails? A. Yes, sir."

As the foregoing testimony was given by the plaintiffs, and was not at all contradicted by the defendant, the plaintiffs are bound by it, and it must be taken as establishing the fact

which it develops; and the fact thus established is of the greatest possible consequence in the case. It entirely destroys, in our opinion, the fundamental allegation of the plaintiffs that the shipments of coal to the plaintiffs and the nail works were made "upon like conditions, and under similar circumstances;" for the shipments of coal to the plaintiffs yielded but one freight to the defendant, while the shipments to the nail works yielded not only the same incoming freight on the coal of at least 20 tons a day, but an additional outgoing freight of 30 to 40 tons a day of fabrics manufactured by the nail works. In view of this testimony, how can it possibly be said that the conditions of the two shipments are alike, and their circumstances similar? That a railroad company may lawfully secure to itself so <sup>Unlike con-
ditions.</sup> important an addition to its business by making a lower charge to one customer than to others is fully established by the authorities, as we shall presently see.

(5) The manufacture and sale by the nail works of nails and muck-bar were outside of, and entirely harmless to, the business of the plaintiffs, and hence a lower price for the coal consumed by the nail works was neither an undue nor an unreasonable discrimination against the plaintiffs, because it was an immaterial circumstance as affecting their business. This is self-evident. The plaintiffs did not deal in nails or muck-bar, and the sale of those commodities by the nail company necessarily could have no effect upon the plaintiff's business, which was the selling of coal to persons who consumed it.

(6) As to all persons who did sell coal at Bellefonte, they were charged the same freights precisely as were charged to the plaintiffs. This is the undisputed testimony.

Let us now see what is the voice of the authorities upon the subject of discrimination in freight charges by carrying companies. The subject is an old one. Prior to any statutes in England or in this country, the common law had pronounced upon the rights and duties of carriers and freighters, and in the enactment of statutes little more has been done than to embody in them the well-known principles of the common law. It happens, somewhat singularly, that the very question we are now considering, of a discrimination in the rates charged to coal dealers and to manufacturers who use coal as a fuel, does not appear to have arisen; and yet it is very certain that such discrimination does prevail, and has prevailed for a long time, on all lines of railway and canal. It is highly probable that the absence of litigation upon such discrimination is due to the general sentiment of its fairness and justness. Within the writer's knowledge, in the section of the state in which he

lives, a much greater difference between the rates charged to dealers and those charged to manufacturers by the coal-carrying companies, has always existed, and now exists, without any question as to its justness or its legality. It is a matter of public history that along the valleys of the Lehigh and the Schuylkill there are great numbers of blast-furnaces, rolling-mills, rail-mills, foundries, machine-shops, and numerous other manufacturing establishments, which consume enormous quantities of the coal output of the state, and, at the same time, in every village, town, and city which abound in these regions, an immensely large industry in the buying and selling of coal for domestic consumption is also prosecuted. And what is true of the eastern end of the state is without doubt equally true throughout the interior and western portions of the commonwealth, where similar conditions prevail. Yet from no part of our great state has ever yet arisen a litigation which called in question the legality or the wisdom or the strict justice of a discrimination favorable to the manufacturing industries as contrasted with the coal-selling industries. This fact can scarcely be accounted for, except upon the theory that such discrimination, as has thus far transpired, has not been felt to be undue or unreasonable, or contrary to legal warrant. In point of fact, it is perfectly well known and appreciated that the output of freights from the great manufacturing centres upon our lines of transportation constitutes one of the chief sources of the revenues which sustain them financially. Yet no part of this income is derived from those who are mere buyers and sellers of coal. When the freight is paid upon the coal they buy, the revenue to be derived from that coal is at an end. Not so, however, with the revenue from the coal that is carried to the manufacturers. That coal is consumed on the premises in the creation of an endless variety of products, which must be put back upon the transporting lines, enhanced in bulk and weight by the other commodities which enter into the manufactured product, and is then distributed to the various markets where they are sold. In addition to this a manufacturing plant requires other commodities besides coal to conduct its operations, whereas a coal dealer takes nothing but his coal, and the freight derived by the carrier from the transportation of these commodities forms an important addition to its traffic, and constitutes a condition of business which has no existence in the business of carrying coal to those who are coal-dealers only. Thus a blast-furnace requires great quantities of iron ore, limestone, coke, sand, machinery, lumber, fire-bricks, and other materials, for the maintenance of its structures and the conduct of its business, none of which are necessary to a mere coal-selling busi-

ness. These are some of the leading considerations which establish a radical difference in the condition and circumstances which are necessarily incident to the two kinds of business we are considering. Another important incident which distinguishes them is that the establishment of manufacturing industries and the conducting of their business necessitates the employment of numbers of workmen and other persons whose services are needed, and these, with their families, create settlements and new centres of population, resulting in villages, towns, boroughs, and cities, according to the extent and variety of the industries established, and all these, in turn, furnish new and additional traffic to the lines of transportation. But nothing of this kind results from the mere business of coal selling. In fact that business is one of the results of the manufacturing business, and is not a co-ordinate with it. The business of the coal dealer is promoted by the concentration of population which results from the establishment of manufacturing industries, and these two kinds of business are not competitive in their essential characteristics, but naturally proceed together, side by side, the coal selling increasing as the manufacturing increases in magnitude and extent.

These considerations are generic, and are suggested for the purpose of illustrating the differences between the fundamental conditions and circumstances of the two industries we are considering.

Recurring now to the authorities, we find that the British statute of 17 & 18 Vict. c. 31 (1854), is perhaps the earliest instance of direct legislation upon this subject. That **Authorities considered.** statute prohibited "undue or unreasonable preference or advantage" in transportation charges, but lacked the restricting words "from the same place, upon like conditions, and under similar circumstances, which appear in our act of 1883. Yet it was held in the cases of *Ransome*, 1 C. B. (N. S.) 437, and *Oxlade*, *Id.* 454, that it was competent for a railway company to enter into a special agreement for the carriage of goods for a particular individual or company at a lower rate in respect of large quantities of goods and longer distances than for one who sends them in small quantities and shorter distances. In *Ransome's Case* it was said by CRESSWELL, J., in delivering the opinion of the court: "After a good deal of consideration, we think that the fair interests of the railway ought to be taken into the account."

In the case of *Nicholson v. Railway Co.*, 94 E. C. L. 366, the same doctrine was held, and it was also held that the second section of the railway traffic act (17 & 18 Vict. c. 31) was not contravened by a railway company carrying at a lower rate, in

consideration of a guaranty of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit, by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guaranty. CROWDER, J., said in the opinion: "When the statute speaks of 'undue and unreasonable preference or advantage,' and 'undue or unreasonable prejudice or disadvantage,' it uses language implying that there may be advantage to one person or one class of traffic and prejudice to another, which would not be within the act of parliament. The preference and prejudice must be 'undue' or 'unreasonable' to be within the statute, and although, in the case now before the court, it is quite manifest that the Raubon Coal Company have many and important advantages in carrying their coal on the Great Western Railroad, as against the complainants and other coal owners in the forest of Dean, still the question remains, are they 'undue' or 'unreasonable' advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Raubon Coal Company."

The justice then proceeded to show that it was to the advantage and profit of the railway company to carry coals for the Raubon Company at a lower rate than for the complainants, and concludes, in the language of the syllabus above quoted, that this was no violation of the act. All of the foregoing cases recognize the proposition that if the interest of the railway company was subserved by charging the lower rate to the one company than to the other, the act was not violated. That conclusion was reached in a case where the complainant was in the same business with the favored company, and was injuriously affected by the discrimination, but the court held that this was permissible if the interests of the railway company were thereby subserved. With how much greater force can it be said that here, where there is no competition in the disposal of the coal of the plaintiffs and the products of the nail company, and also where the inducement to the defendant to make the lower rate for the nail company is a largely increased traffic on the defendant's road, neither the letter nor the spirit of our act of 1883 was violated.

The doctrine of the cases above cited was also declared in the case of *Boxendale v. Railroad Co.*, 94 E. C. L. 353, where COCKBURN, J., said: "If any arrangement were made by a railway company whereby persons bringing a larger amount of traffic to the railway should have their goods carried on more favorable terms than those bringing a less quantity, a court might uphold such an arrangement as an ordinary incident of

commercial economy, provided the same advantage were extended to all persons under the like circumstances." This latter incident would of course be essential where all of the favored class were in the same business.

In the case of *Messenger v. Railroad Co.*, 37 N. J. Law, 531, cited for the appellee, the court was careful to say that "it must not be inferred that a common carrier, in adjusting his price, cannot regard the particular circumstances of the particular transportation. Many considerations may properly enter into the agreement for carriage or the establishment of rates, such as the quantity carried, its nature, risks, the expense of carriage at different periods of time, and the like; but he has no right to give an exclusive advantage or preference in that respect to some over others for carriage in the course of his business."

In that case there was a very clear preference to one party over all others in the same business by the railroad company giving him a specific drawback upon freights on hogs carried from the same points, and, of course, as this was direct preference over all others, it was in violation of the law. But that decision has no application to this case.

In the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 49 Am. & Eng. R. Cas. 243, it was held that the issue by a railway company engaged in interstate commerce of a party-rate ticket for the transportation of 10 or more persons at a rate less than that charged to a single individual for a like transportation on the same trip did not make an unjust or unreasonable charge, nor an unjust discrimination, nor give an undue or unreasonable preference or advantage to the purchasers of the party-rate ticket, within the meaning of the several provisions of the Interstate-commerce Act of 1887. There was much discussion of the general subject of the prohibition of the general statute in the opinion of the supreme court of the United States in this case, from which it will be instructive to present some quotations. The English traffic act of 1854, above referred to, was fully considered, and the cases of *Oxlade* and *Ransome*, and others hereinbefore cited, were recognized and followed. Among other things, it was said by Mr. Justice BROWN, who delivered the opinion: "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust and unreasonable. For instance, it would be obviously unjust to charge A. a greater sum than B. for a single trip from Washington to Pittsburg; but if A. agrees not only to go, but to return by the same route, it is no injustice to B. to permit him to do so for a reduced fare, since the services are not alike, nor the circumstances and conditions substantially

similar, as required by section 2, to make an unjust discrimination. Indeed, the possibility of just discrimination and reasonable preferences is recognized by these sections in declaring what shall be deemed unjust. * * * In order to constitute an unjust discrimination under section 2, the carrier must charge or receive directly from one person a greater or less compensation than from another, or must accomplish the same thing indirectly, by a special-rate rebate, or other device; but in either case it must be for a "like and contemporaneous service, in the transportation of a like kind of traffic, under substantially similar circumstances and conditions." To bring the present case within the words of this section we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible. In this connection we quote with approval from the opinion of Judge JACKSON in the court below: "To come within the inhibition of said sections the differences must be made under like conditions; that is, there must be contemporaneous service in the transportation of like kinds of traffic, under substantially the same circumstances and conditions. * * * In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of conditions and a change of circumstances justifies an inequality of charge. * * * But, in so far as relates to the question of 'undue preference,' it may be presumed that congress, in adopting the language of the English act, had in mind the construction given to these words by the English courts, and intended to incorporate them into the statute. *McDonald v. Hovey*, 110 U. S. 619."

In the case of *Railroad Co. v. Gage*, 12 Gray 393, the right to discriminate upon the basis of a carriage for a certain time, and in certain quantities, was declared. The claim of the shipper was for an equality of charges for shipments of ice with charges for shipments of bricks, because they were of the same class of freight; but the claim was not allowed. The court said, by way of illustration of the principle upon which there might be a lawful discrimination of rates upon the same class of goods: "If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for individuals for a certain time, or in certain quantities, for less compensation than what is the usual, necessary, and reasonable rate, he may undoubtedly do so without entitling all other persons and parties to the

same advantage and relief." And this court said in the case of *Shipper v. Railroad Co.*, 47 Pa. St. 338 "We are not prepared to say that a railroad company may not discriminate in its rate of tolls in favor of domestic trade over foreign, in favor of home products over those which are extraterritorial; especially when the railroad lies wholly within the state. Ownership may not be a reasonable ground for a distinction, but weight, bulk, value, place of production, and many other things, may be."

These cases are cited as illustrations of various reasons and principles upon which lawful discriminations may be made even in charges for the carriage of the same goods over the same roads, and to be used for the same purposes. But in the present case, where not only a particular quantity must be furnished to the railroad every day, but the goods at the point of delivery are to be used for totally different purposes, which do not conflict or compete with each other, the reason for a discrimination has an infinitely greater force.

In *Hutchinson on Carriers* (page 353), after a protracted review of all the cases (and they are very numerous), the writer sums up the result thus: "Mere inequality in charges does not, therefore, of itself amount to an unjust discrimination. It only becomes such when a discrimination is made in the rates charged for transportation of the same class, of different shippers, under like circumstances and conditions. So a mere reduction from the established rate is not necessarily an unjust discrimination, but it becomes such when it is either intended, or has a natural tendency, to injure another shipper in his business, and destroy his trade by giving to the favored shipper a practical monopoly of the business."

We come now to consider the case of *Borda v. Railroad Co.*, 141 Pa. St. 484. It was an action of case brought against the Philadelphia & Reading Railroad Company by the plaintiffs, who were shippers of coal, to recover damages for alleged illegal discriminations in the freight charged to the plaintiffs on shipments of coal over the defendant's road, as against lower rates charged to other shippers over the same road. The case was by agreement of the parties, referred to Mr. Peter McCall as referee, who made a most exhaustive and elaborate report denying the claim of the plaintiffs, and his report was affirmed by this court. As the shipments had been made prior to the adoption of our constitution of 1874, a preliminary question arose, whether it was the duty of the defendant to carry without discrimination. The referee held that such was the duty of the defendant, saying: "I regard it, then, as settled law in this state that a railroad company, a common carrier, owes a duty of equality to every citizen;

and I adopt the position taken by Mr. Bullitt in argument that railroad companies have no right to make any undue discrimination or preference in their charges, and a charge made to one shipper higher than another, for the same service, under like circumstances, constitutes undue preference and discrimination, and, by consequence, renders the charge unreasonable. Such is the general rule, and it is vastly important to the general public that there be no undue relaxation of this rule for, exercising, as they practically do, a monopoly of transportation on their roads, railway managers have in their hands a tremendous power, by discrimination, to enrich one man and ruin another. The equality, however, which is thus prescribed is not a strict and literal equality under all circumstances, however varying and different. It is rather an equality in the sense of freedom from unreasonable discrimination. It is only unjust, undue, or unreasonable discrimination against which the law has set its canon. Arbitrary discrimination is illegal; is discrimination made with a view of giving advantage to one person. But the truism that circumstances alter cases applies here, and under a different state of circumstances a discrimination may be reasonable and lawful, which, were the circumstances the same, would be undue and unreasonable. In order to render lawful an inequality of charge, the goods must be carried under different circumstances, and the question whether the difference is material or essential arises in each particular case."

The writer regards the foregoing as the most precise and the most felicitous expression of the law upon the general subject under consideration that he has met with, and therefore quotes it entire.

The claim of the plaintiff was to recover damages to the amount of upwards of \$60,000 for unjust discrimination in favor of Audenried & Co., rival coal shippers to the plaintiffs, by the payment to Audenreid & Co. of rebates on coal shipped from Port Richmond to points beyond New Brunswick at the rate of \$1.65 for steamer coal, and other rates for other grades. It was proved that these rebates were paid under agreements between Audenreid & Co. and the defendant, made at the beginning of the season, and to continue throughout the season, and the referee was of opinion, and so found, that these contracts for continuous shipments during the whole season at fixed rates constituted such a difference in the conditions and circumstances of the shipments for Audenreid & Co. and the plaintiffs, respectively, as to justify the discrimination, and prevent it from being illegal. In expressing his conclusions the referee says: "The defendant's case denies that the discrimination was wilfull, and made with any such design as

imputed by the plaintiffs. It rests upon the ground that the payment of the drawbacks to Audenreid & Co. was under an honest and *bona-fide* belief that they were entitled to them, under an arrangement by which, in consideration of their having made contracts early in the spring for delivery of coal at fixed prices throughout the season, they were allowed the drawbacks in question. * * * On the whole, I am of opinion, upon the best consideration I have been able to give the subject, that the defendant did not pay to Audenreid & Co. the drawbacks complained of in the first and additional count of the declaration wilfully, and with intent to enable them to increase their business at the expense of the plaintiffs, but that it paid the same in good faith, under the belief that Audenried & Co. had made contracts in the spring at a fixed price for the delivery of the coal. * * * I am of opinion, therefore, that the defendant could legally have allowed the drawbacks to Audenried & Co. which it did allow, if that firm had had contracts made in the early part of the season for delivery of coal in the eastern market at fixed prices. In that case, although the service rendered, to wit, the transportation, would have been the same as that rendered to the plaintiffs, yet the circumstances were different, and the difference of circumstances would have justified the discrimination."

While this court did not review the testimony taken before the referee, because it was not before us, we affirmed the judgment in favor of the defendant upon the report, conceding the facts to be as found by the referee.

It will be perceived, therefore, that, in that case the circumstance that the coal was shipped for Audenried & Co., under contracts made at the beginning of the season, at fixed prices, and to continue throughout the season, was held a sufficient reply to a charge of unjust discrimination, although the commodity shipped was the same, to wit, anthracite coal, and the shipments were between the same points, to wit, from Port Richmond to points east of New Brunswick, and the plaintiffs were engaged in the same business as Audenried & Co.

Whereas here the plaintiffs were not engaged in the same business as the Bellefonte Nail Company, there could not be any competition between them in the products sold, and the rate at which coal was carried for the nail company was a matter of absolute indifference to the plaintiffs. We repeat again that we do not regard the sales of coal by the nail company to its own employes as of any moment in the case: (1) because there is no proof that they were made with the knowledge

Sales to employes—Duty of carriers on acquisition of knowledge of sales.

of the defendant, but there is positive and uncontradicted proof that they were made without such knowledge; (2) because the defendant is not responsible for such sales by the nail company; (3) because the coal carried by the defendant for the nail company was not carried for the purposes of sale at retail, but for the purpose of manufacturing nails and muck-bar; (4) because there is no proof that the plaintiffs sustained any damage by reason of the sales of the nail company to their employes.

But it must be understood, and we so decide, "that a manufacturing company has no right to engage in the business of selling coal, even to its own employes; and if it does so, and the transporting company is notified of such selling, it must thereupon cease to carry coal to the manufacturing company at any less rate than it charges to the coal dealers, or incur the penalties of unjust discrimination.

The ruling of the court below would require that coal carried to blast-furnaces, rolling-mills, rail-mills, founderies, and all other manufacturing enterprises, should be carried for the same price as the coal carried to any retail dealer in the same locality, though the quantity consumed by the former might extend to many thousands of tons each year, while the quantity carried for the latter might be a few hundred tons only, and although the manufacturing companies gave back to the carrier many thousands of tons of freight each year, while the retail dealer gave back none, and although the business of the manufacturer in no wise competes with the business of the dealer. We think the differences in these respects between these two kinds of business are such as to justify a discrimination in the rates of freight charged to each, and the conditions of the two are not alike, and their circumstances are not similar, within the meaning of our act of 1883, and therefore there can be no recovery in this case.

The fact that the payment of the rebates was not known to the plaintiffs is of no possible consequence, both because they had no right to know it, under our present ruling that the circumstances were not similar, and the conditions not alike, and also because, if the discriminating charge was lawful, the absence of notice to the plaintiffs would not make it unlawful. The same point was made and ruled in the Borda Case. The referee said: "But in point of law I do not think that the duty of giving notice to the world of every special rate rests upon the carrier, under penalty of being guilty of unlawful discrimination by his omission to give such notice. How and to whom is such notice to be given?"

It remains only to be added that differences of freight rates

on coal to manufacturers and to mere dealers are, and have been for many years, in universal practice, and not a single case other than this has as yet reached the courts of last resort in England or in the United States, questioning the entire legality and propriety of such differences, and that circumstance is ample proof that both the professional and the lay mind have assented to the practice. Lack of adjudication.

Speaking upon a similar subject—the difference in passenger rates upon ordinary tickets and thousand-mile tickets or go-and-return tickets—the supreme court of the United States, in the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 49 Am. & Eng. R. Cas. 243, said: “In view of the fact, however, that every railway company issues such tickets; that there is no reported case, state or federal, wherein their illegality has been questioned; that there is no such case in England; and that the practice is universally acquiesced in by the public—it would seem that the issuing of such tickets should not be held an unjust discrimination or an unreasonable preference to the persons travelling upon them.”

On the question of damages the court below charged the jury: “If the nail works paid twenty cents less freight per ton on their coal, they had that much of an advantage over others; and the law would seem, in the mind of the court, to fix that excess as the measure of the plaintiffs’ damages.” Damages.

We think this was serious error. The act of 1883 contains no language justifying an instruction that the party injured can recover three times the amount of the difference in the rates charged. The words of the act are: “Any violation of this provision shall make the offending company or common carrier liable to the party injured for damages treble the amount of injury suffered.” The “amount of injury suffered” is the measure of the single damages to be allowed. But it does not at all follow that the amount of injury suffered is the difference in the rates charged. It might be, or it might not be, but, in any event, it must be a subject of proof, and there was no proof in the case of the actual damage sustained. How does it follow that because the defendant company paid in 1889 to the nail company a rebate of some \$6000 on all the shipments that had been made from 1881, and a few sums thereafter, the plaintiffs suffered damage to any extent? In point of fact the nail company paid the full freight of 50 cents a ton net during all these years, and their claim for rebates was not adjusted until 1889. How, then, does it appear that damage was suffered by the plaintiffs in

consequence of the payment of the rebates to the nail company? It does not appear that the plaintiffs sold their coal for any less than the current market price at any time except when they and the other dealers were engaged in a war of prices, and sold it far below actual cost in a struggle to capture the market, and it does not appear but that the plaintiffs would have sold their coal at 20 cents less than they did if they had received the rebate. The natural inference is that that is precisely what they would have done in the contest for the market. But of all this there is not a word of testimony, and yet it is only actual damage that they can recover. The proof for the defendant was that they never cut the market price to their men, but maintained it even when the coal-dealers of the town were slaughtering each other's trade by selling below cost. As three times the actual damage is the penalty the defendant would have to pay if the judgment were sustained, they have a right to require very clear and definite proof as to what the actual damage was.

When blast-furnaces and great iron mills are built, they are not placed in cities or towns, but in the open country, where land is abundant and cheap, and of course on the line of a railroad. When they are established there is no population at the place of erection. The railroad companies are very willing to make as favorable terms as possible for freights on all the materials that are brought to the plants, and on all products that are carried from them, because they get a largely-increased business from such enterprises. When the works are erected, houses are built for the men and officials of the companies. After that come the usual accessories required to supply the wants of the population, to wit, merchants, tradesmen, mechanics, butchers, bakers, grocers, and, among others, coal dealers. But the moment the last of these arrive, if the principles which prevailed in the court below in this case are correct, the whole freight system agreed upon between the transporter and the manufacturer theretofore must be changed and advanced to the freight rates charged to the retail dealers, or else all the rates charged to such dealers must be lowered to conform to the rates charged to the manufacturer. If this is not done, the manufacturer incurs the risk of being visited years afterwards with claims for treble damages, which may embrace any period of six years, and, as all the dealers have the same right of action in this regard that any of them has, and every town or city along the line has some or many retail coal dealers and manufacturing establishments also within its limits, it is easy to see that the aggregate of such claims may soon absorb the entire property and assets of the strongest transporting com-

panies of the state. We do not find anything in the law that renders necessary or possible any such results as these, and we think it wiser and better to administer the law so that the rights and interests of all may be conserved within rational and sensible limits.

We sustain the first, second, third, and fifth assignments of error. The fourth and sixth assignments have no merit, and are not sustained.

Judgment reversed.

Discrimination in Freight Rates—Coal Traffic.—See *Glasgow & Southwestern R. Co. v. Mackinnon*, 27 Am. & Eng. R. Cas. 1, and note, 7.

Statutory Prohibition of Overcharges.—See *Chicago, Burlington & Quincy R. Co. v. Jones* (Ill.), *ante*, p. 78, and note, p. 103.

Interstate-commerce Act—Long- and Sort-haul Clause.—See *Osborne v. Chicago & N. W. R. Co.* (C. C.), 49 Am. & Eng. R. Cas. 12, and note, 22.

Reasonableness of Rates—Test for Determining.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that in determining whether local rates for transportation fixed by a state statute are unreasonable, and whether such rates afford fair compensation to those interested in the railroad properties, the cost of the carriage of the local freight should be ascertained; also what the receipts have been therefrom, what reduction will be made in such receipts by the application of the act, and then take such proportion of the gross investment in the road as the present earnings from local freights bear to the total earnings of the road, and from these computations determine whether the reduction made by the act in the local freights, if applied to all the company's business, would leave any compensation to the owners, and, if so, how much.

What is an Unreasonable Rate.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it appeared that an act establishing maximum rates of freight charges for local business would have the effect of reducing such rates $29\frac{1}{2}$ per cent; that the receipts from local freights were about $7\frac{1}{2}$ per cent of the entire receipts of the company, and that it was necessary that the local freight should contribute $7\frac{1}{2}$ per cent of the amount necessary to pay interest on the bonded indebtedness resting on the line within the state, and that the rates in force were voluntarily established by the companies in view of competition between them, and it was held that the reduction was unreasonable.

Comparison with Rates of Adjoining State.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that, in determining the reasonableness of freight rates, a comparison between the rates in one state and those in an adjoining state is not of much aid where the conditions in the two states are substantially different.

Joint Tariff by Connecting Lines as Standard of Reasonableness of Local Rate by Either Line.—In *Parsons v. Chicago & N. W. R. Co.* (U. S. Cir. Ct. App. 8th Cir., Sept. 24, 1894), 63 Fed. Rep. 903, it was held that where two connecting carriers unite in putting in force a joint through tariff between given points, such joint tariff is not a standard by which the reasonableness of the local tariff on either line is to be determined. *Following Railway Co. v. Osborne*, 52 Fed. Rep. 912, 53 Am. & Eng. R. Cas. 18.

Interstate-commerce Rates.—In *Murray v. Chicago & N. W. R. Co.* (U. S. Cir. Ct. N. D. Iowa, Cedar Rapids Division, June, 14, 1894), 62 Fed. Rep. 24, it was held that in determining the obligations assumed by a common carrier engaged in interstate commerce, the court has the right to apply

the rules of the common law, unless the same have been changed by competent legislative action, and in determining the reasonableness of rates exacted by a carrier engaged in such commerce, all shipments made before the adoption of the Interstate-commerce Act are governed by the common law, and those made since the adoption of that act by the common law as modified by that act.

Comparison of Rates Established by State Legislation with Interstate Rates.—In *Swift v. Philadelphia & R. R. Co.* (U. S. Cir. Ct. N. D. Ill., Nov. 27, 1893), 58 Fed. Rep. 858, it was held that the local municipal law of the several states is not applicable to the reasonableness of interstate rates, and cannot be appealed to as a basis in suits by shippers.

Determination by Commissioners of what Shall Constitute a "Carload."—In *Pugh v. Kansas City, St. J. & C. B. R. Co.*, 118 Mo. 506, it was held that in view of an existing custom, the determination of railroad commissioners that a carload of cord-wood should mean 10 tons in place of all that a car could safely carry, was reasonable and just. *Reaffirming* *Ross v. Railroad Co.*, 111 Mo. 18.

Power of Federal Court to Determine Reasonableness of Rates Established by State Statute.—In *Ames v. Union Pacific R. Co.* (U. S. Cir. Ct., D. Neb., Nov. 12, 1894), 64 Fed. Rep. 165, it was held that the fact that an act establishing maximum rates for the transportation of freight within the state, which provides that any company believing the established rates to be unreasonable or unjust, may bring an action in the supreme court of the state, and if that court is satisfied that the rates are unjust and unreasonable, as claimed, authorizing to direct the state board of transportation to permit the plaintiff to raise its rates in the discretion of such board, etc., does not furnish such an adequate legal remedy as will preclude recourse in a proper case to a federal court sitting in equity.

Sufficiency of Complaint in Action to Enjoin Enforcement of Rates Established by Railroad Commissioners and to Call Reasonableness of Rates in Question.—In *Burlington, C. R. & N. R. Co. v. Dey* (Iowa, Oct. 5, 1893), 56 N. W. Rep. 267, it was held that a complaint in an action to enjoin railroad commissioners from enforcing an order establishing joint rates which charged that the rate was unlawful and in excess of the power of the commission, not because of the unreasonableness of the rate fixed, but because the statute under which the order was made was unconstitutional and void for alleged reasons, did not raise any issue as to the reasonableness of the rate in fact made.

Conclusiveness of Verdict as to Reasonableness of Rates.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that where the evidence as to the reasonableness of rates charged by a railroad company for the transportation of freight is conflicting, a verdict for the plaintiff will not be set aside where there is ample evidence to sustain it.

Actions to Recover Back Overcharges—What Constitutes Interstate Commerce—Passing beyond Boundaries of State in Transporting Goods between Points within State.—In *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, it was held that under a statute (Rev. Stat. 1889, §§ 2637 and 2648) allowing the recovery of treble damages by a shipper from a carrier who receives a greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions than for a shorter than a longer distance in the same direction, the fact that in course of transportation between points within the state the property transported passed the boundaries of the state, did not make such transportation a matter of interstate commerce so as to deprive the shipper of the right to recover under the statute.

Sufficiency of Declaration—Necessity of Allegation of Establishment of Rates under Interstate-commerce Act.—In *Swift v. Philadelphia & R. R.*

Co. (U. S. Cir. Ct. N. D. Ill., Nov. 5, 1894), 64 Fed. Rep. 59, it was held that in the absence of an averment in a declaration to recover back freight-charges alleged to have been illegally exacted, that rates were published and in existence as required by the Interstate-commerce Act, the action would not lie, since by fixing and publishing the rates the act supplies at least *prima facie* evidence of a contract rate which can only be overcome by averment in avoidance thereof.

Evidence—Proof of Discrimination.—In *Seawell v. Kansas City, Ft. S. & M. R. Co.* 119 Mo. 222, it was held that under a statute (Rev. Stat. 1889, §§ 2637 and 2643) authorizing a recovery by a shipper against a common carrier of treble damages for receiving a greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance in the same direction, the shipper need not show that the shipments were actually made during the time complained of over the longer distance, but it is sufficient if it appears that the carrier published and held out to the public its intention of carrying property over such longer distance at the same rate at which it charged for the shorter distance.

It was further held that the fact of transportation over the longer distance at the same rates before and after the time during which the complainant shipped merchandise over the shorter distance was admissible to show damages to the shipper.

Admissibility of Proof of Rates Charged by Other Lines in Other States.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, which was an action under a statute to recover for overcharges for transportation, it was held that the court properly excluded evidence as to rates charged by other companies in other states.

Exclusion of Evidence of Value of Road—Iowa Statute—Harmless Error.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, which was an action under a statute to recover for overcharges for the transportation of merchandise, it was held that the exclusion of evidence as to the value of a railroad was not reversible error, where evidence to the same effect was admitted without objection and was not controverted.

Measure of Damages.—In *Seawell v. Kansas City, Ft. S. & M. R. Co.*, 119 Mo. 222, it was held that under a statute allowing a shipper to recover treble damages of a carrier for receiving a greater compensation in the aggregate for the transportation of like kinds of property under similar circumstances and conditions for a shorter than a longer distance in the same direction, the measure of the shipper's damages is the amount which the sum charged by the carrier for the shipment over the shorter distance exceeds that charged over the longer one.

Right to Interest on Verdict under Statute Allowing Treble Damages.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, it was held that under a statute allowing a recovery in actions for overcharges for transportation of freight, of three times the amount of actual damages sustained, the jury cannot add interest to their verdict.

Allowance of Counsel Fee—Iowa Statute.—In *Hopper v. Chicago, M. & St. P. R. Co.* (Iowa, Oct. 6, 1894), 60 N. W. Rep. 487, which was an action to recover the sum of \$830, alleged to have been exacted as freight charges in excess of the legal rate, it was held that under a statute allowing the recovery of treble damages, and providing that the court should allow a reasonable sum as counsel or attorney's fees, that the sum of \$200 should be allowed to the plaintiff's attorneys for defending an appeal from a judgment below in their client's favor.

KANSAS PACIFIC R. Co.

v.

BAYLES.

(Colorado Supreme Court, February 5, 1894.)

Right of Discrimination by Carrier at Common Law.—At common law all shippers stand on an absolute equality with reference to transportation by common carriers, and any such carrier has the right to discriminate in favor of one shipper as against the other.

Effect of Constitutional Inhibition of Discrimination against Shippers.—Where a constitutional inhibition exists against undue or unreasonable discrimination in contracts of carriage, the carrier may agree to transport freight at less than schedule rates, but an agreement not to allow the same rates to others is void.

Contracts of Carriage by Receivers—Necessity of Authority from Court.—An order of the court is not necessary to authorize a receiver to make contracts respecting rates for the transportation of freight.

Same—Authority to make Contracts for Carriage beyond Limits of Road Operated by Receiver.—Railroad receivers have power to make contracts for the carriage of goods beyond the limits of the road immediately under their control.

Same—Binding Effect of Receiver's Contract upon his Successor.—A contract made by a receiver for the carriage of goods at less than schedule rates is not binding on his successor.

Same—What Constitutes Ratification of Contract made by Predecessor of Receiver.—The successor of a receiver will not be deemed to have ratified a contract for freight rates made by his predecessor merely from the fact that a portion of the rebate accruing before he entered upon the discharge of his duties was paid after he assumed the management of the business.

Duty of Contracting Receivers to Refund Rebates—Liability of Railroad Company.—Receivers made a contract for the carriage of goods which contained an agreement to allow certain rebates to the shipper. *Held*, that there was an obligation upon the receivers to refund the rebates in so far as the merchandise of the contracting party was received and transported during the time they were operating the road, and that the railroad company, having received the benefit of the excess paid, was liable to the shipper therefor.

APPEAL from Arapahoe county district court.

Statement by HAYT, C.J.: It is unnecessary to repeat in detail the facts alleged in the complaint as a first cause of action, as the same are fully set out in connection with a former appeal, and will be found in *Bayles v. Railway Co.*, 13 Colo. 181, 40 Am. & Eng. R. Cas. 42. It is sufficient for the purposes of this appeal to state that the suit

Case stated.

is brought to recover certain rebates agreed to be paid the plaintiff upon freight charges paid to the railroad company. The contract fixing the rate and rebate, it is alleged, was executed on the part of the receiver of the railroad company by S. R. Ainsley, at the time general freight agent at the city of Denver under the receivers, Henry Villard and Carlos S. Greeley. It is averred that Ainsley made the contract for the receivers, and that it was adopted by them and by their successor, S. T. Smith, who afterwards operated the road as receiver; that at the time the contract was made, and during its entire term, Ainsley was operating the railway for the receivers, and that he and they performed it in part by paying rebates according to its terms; that the receivers received the moneys paid by plaintiff for freights under the contract, and used the same, in part, in the operation of the road, paying the balance to appellant, and taking a receipt from the railroad company, by the terms of which the company obligated itself to pay any and all claims against the receiver then outstanding; that this claim was existing at the time of Smith's discharge as receiver.

For a second cause of action, it is alleged that during the month of December, 1878, there arrived at Kansas City large amounts of goods consigned to the plaintiff at Denver, entitled to be carried under said contract, but that the defendant refused to carry the same under the contract, and that the goods remaining in Kansas City until after the 1st day of January, 1879, the plaintiff caused the same to be shipped to Denver over the Atchison, Topeka & Santa Fé Railroad, and was obliged to pay \$216 more than the contract price of carriage, and that he paid said sum on the 25th day of January, 1879; that said goods were holiday goods, and he lost a profit of \$500 by failure of defendant to carry them under the contract.

After the case was remanded by this court the defendant filed an answer—First, denying each and every allegation of the complaint; second, admitting that Greeley and Villard were receivers at the time the contract was made; admitting that Smith was appointed in lieu of said Greeley and Villard on or about the 25th day of October, 1878, and that he continued to act in such capacity until June, 1879; denying that Greeley and Villard, or either of them, had any authority to make the contract.

It denies that by order of the court, or otherwise, they were ever empowered to make the contract set forth in the complaint; denies the agency of Ainsley, and alleges that immediately after Smith became receiver, learning of this contract, he repudiated the same, as not made by authority, and as not binding upon him; alleges that the contract was contrary to

public policy, and void, and not binding upon either the company or upon the receiver Smith.

Afterwards a replication was filed to the new matter in the answer, and upon these issues the cause was submitted in the court below upon the evidence introduced by plaintiff, supplemented by a stipulation of counsel.

A verdict and judgment having been rendered for the plaintiff, the defendant again brings the case here by appeal.

Feller & Orahood, for appellant.

Browne & Putnam, for appellee.

HAYT, C.J., (after the foregoing statement): This case is before the court for the second time. Upon the former appeal the sufficiency of the complaint was inquired into and upheld, and the case remanded for further proceedings, *Bayles v. Railway Co.*, 13 Colo., 181, 40 Am. & Eng. R. Cas. 42. The conclusions then reached, and the reasons therefor, are set forth in an exhaustive opinion by Mr. Commissioner PATTISON. It is unnecessary to repeat the reasoning of the learned commissioner, or to do more than restate such of his conclusions as bear directly upon the questions now presented. These may be summarized as follows:

First. Freight charges must be reasonable, and when the circumstances and conditions are the same they must be equal.

Second. An agreement for a rebate from the published tariff rates does not, of itself, necessarily constitute unjust discrimination, within the meaning of the law.

Third. The contract set forth in the complaint is *prima facie* legal, and binding upon the parties, and the burden is upon the defendant to establish facts showing its illegality.

Fourth. It being especially alleged that the receiver operated the railway and controlled the business of the company, it cannot be assumed, in the absence of evidence, that the contract was in violation of his authority.

These conclusions are, upon the present appeal, *res adjudicata* of the points decided, and must be accepted as the law of this case. *Lee v. Stahl*, 13 Colo. 174; *Johnson v. Bailey*, 17 Colo. 59; *Routt v. Land Co.*, 18 Colo. 132; *Israel v. Arthur*, 18 Colo. 158.

At common law all shippers stand on an absolute equality with reference to transportation by common carriers, and no such carrier has the right to discriminate in favor of one, as
 Discrimination
 at common law. against another. In obedience to this universally-recognized principle, the framers of our constitution have provided, in section 6, art. 15, as follows:
 "All individuals, associations, and corporations shall have

equal rights to have persons and property transported over any railroad in this state, and no undue or unreasonable discrimination shall be made in charges or in facilities for transportation of freight or passengers within the state, and no railroad company, nor any lessee, manager, or employé thereof shall give any preference to individuals, associations, or corporations in furnishing cars or motive power."

Neither the common law nor the constitutional provision inhibits the making of contracts by a common carrier to transport either persons or freight at less than its schedule rates, but an agreement not to allow the same rates to others is void. To this extent the law is well settled, as will appear by the copious extracts from adjudicated cases, and the citation of numerous authorities to be found in the former opinion in this case. Constitutional inhibition against discrimination.

The foregoing views are based upon sound public policy. To permit a railroad company to unjustly discriminate in the carriage of either freight or passengers, in favor of one shipper as against another, or in favor of one locality as against others, would be destructive of common right, and allow private and public enterprises to be built up or pulled down at the will or caprice of a common carrier deriving its franchise from the people.

It is contended, however, that unreasonable discrimination can be best prevented by declaring all contracts for rebates void, but this rule has the disadvantage of allowing a common carrier to profit by its own iniquity. It would tolerate the acquisition of business by means of a promised reduction in rates, and at the same time place it in the power of the carrier to retain the higher rate by denying redress to the shipper. It would seem that the public interest would be equally as well subserved, in cases of this character, by saying to the carrier: "You may contract for a less rate than that provided by the published tariff sheets, but you must give all parties shipping under like conditions and similar circumstances like reduced rates." This is in accordance with the result reached in the case of *Railway Co. v. Goodridge*, 149 U. S. 680, 13 Sup. Ct. 970, but the conclusion in that case is based upon a statute of this state. The cause of action in the present case having arisen before the passage of any statute on the subject by the federal congress or the state of Colorado, this case must be determined independently of statute law.

It is contended that Ainsley's authority to execute the contract on behalf of the receivers is not sufficiently shown, and that the contract was not sufficiently established to render the same admissible in evidence. The evidence shows that the contract was executed by Mr. S. R. Ainsley, he being at the

time the freight agent at Denver of the receivers, Villard and Greeley, then operating the railroad; that he (Ainsley) occupied the same position with reference to the company prior to the appointment of the receivers; and that he continued in the same position after the resignation of Villard and Greeley and the appointment of S. T. Smith as receiver. The evidence also shows that the existence of the contract was well known to the general officers of the road, and that they undertook to carry out its provisions until Receiver Smith assumed control. It is not to be expected that the receiver of an extended line of railroad, traversing several states, and doing a general business, will be personally consulted with reference to all contracts made in the management of the business of the corporation. He must necessarily act through others in many matters of importance; and, in the absence of evidence to the contrary, the court had a right to assume that Ainsley's authority under the various receivers was the same as that exercised by him while occupying a similar position before the management passed into the hands of the court. We do not think that any order of court is necessary to authorize the making of contracts with reference to freight rates. Such matters are usually left to the officers of the freight department of a railroad company. In the case of *Railroad Co. v. Headland*, 18 Colo. 477, 58 Am. & Eng. R. Cas. 4, it is said: "The manner in which railroad companies conduct their business has been so long followed, and with such a degree of uniformity, that courts are bound to take judicial notice of its general features." Under the circumstances, we think the contract was properly admitted in evidence.

The agreement being to carry goods from New York, Chicago and St. Louis to Denver, while the appellant's road did not extend east of Kansas City, it is urged that the making of the contract was beyond the power of the receiver.

Carriage beyond limits of road.

We do not think this contention is well founded. The receivers, subject to the orders of the court from whom their authority emanated, had full power to conduct the business of the corporation according to approved methods of operating such enterprises; and no reason is perceived why such officers should not be permitted to make contracts for the carriage of freight and passengers beyond the limits of the road immediately under their control. Such contracts are usual, and perhaps necessary, in many instances, to the successful operation of the business of common carriers, and are also a great public convenience.

By the former opinion of this court in this case, the burden of showing the illegality of the contract by pleading and proof

was placed upon the defendant. The answer thereafter filed contains no allegation to the effect that the enforcement of the contract would inflict any injustice upon any other shipper. It is, however, alleged in the answer that Smith, from the first, refused to receive or transport merchandise under the contract, or for less than schedule rates,—and from the evidence adduced, and the stipulation entered into at the trial, it is shown that upon several occasions, while Smith was operating the road as receiver, merchandise of plaintiff was refused transportation at less than schedule rates, but the exact date of such refusals does not clearly appear. Although the contract is established as a valid contract of the receivers Villard and Greeley, it does not follow that it was binding upon their successor, Smith. As receiver, he cannot be held merely on the contract, but became liable, if at all, solely by reason of his own acts. *Turner v. Richardson*, 7 East, 335; *Com. v. Franklin Ins. Co.*, 115 Mass. 278.

Binding effect
of contract on
successor to
receive.

Mr. Beach, in his work on Receivers, at section 299, says: "Contracts made by preceding receiver impose no legal duty or obligation on his successor, and damages cannot be recovered at law against the succeeding receiver for refusing to perform the contracts of his predecessor."

And in the case of *Lehigh Coal & Nav. Co. v. Central R. Co.*, 38 N. J. Eq. 175, it is said: "It is certain the present receiver is no party to these contracts. He neither negotiated them nor assented to them. He has not been directed by the chancellor to perform them. It is not possible, therefore, for me to see how he was under the least legal duty to perform them, nor under what legal rule he can be held liable at law for not performing them. He cannot be said to have broken them, because he was under no obligation to perform them. He had promised nothing, and could not, therefore, be required to perform anything. He is not the representative of his predecessor. In his character as receiver his predecessor can have no representative, in the legal sense of that term. He was, at best, a mere agent or instrument; and, when he died, his power died also, and he left nothing behind him, as receiver, of either property or power, in which he can be represented so as to make his acts binding on his successor. It may be that the contracts of the first receiver bound the trust." See, also, *Express Co. v. Railroad Co.*, 99 U. S. 191; *Com. v. Franklin Ins. Co.*, *supra*; *In re Receivers N. J. & N. Y. Ry. Co.*, 29 N. J. Eq. 67; *Lehigh Coal & Nav. Co. v. Central R. Co.*, 41 N. J. Eq. 167; *Ellis v. Railroad Co.*, 107 Mass. 1.

Receiver Smith was not a party to the contract, nor the le-

gal representative of a party, and he was not, in law, bound to carry out its terms, although the court from which his appointment emanated, in the exercise of its equitable powers, might have entertained an application to compel him to do so. He cannot be held to have ratified the contract from the mere fact that a portion of the rebates accruing before he entered upon the discharge of his duties as receiver were paid after he assumed the management of the business. It was not inconsistent for him to say that, in so far as merchandise had been transported under the contract during the management of the former receivers, the terms of the contract should control, and at the same time repudiate the contract as not binding upon him as to future shipments; that for the carriage of goods thereafter offered for transportation the schedule rates should control.

If plaintiff relied upon a ratification of the contract by Smith, the evidence introduced is not sufficient to establish such ratification. If Smith, or his subordinate officers in the management, with knowledge of the terms of the agreement, received and transported freight under it, or did any other act tending to show ratification, the record fails to disclose such fact.

Under the proof adduced, it was error to allow a recovery upon the claim for rebates for freight shipped during Smith's administration of the affairs of the company. It was likewise error to include in the judgment the amount claimed under the second cause of action pleaded.

Our conclusion upon the case, as now presented, is that the contract imposed an obligation upon the receivers, Villard and Greeley, to refund the rebates, as specified therein, in so far as plaintiff's merchandise was received and transported during the time they were operating the road as receivers, and that appellant, having received the benefit of the excess paid, is liable to plaintiff in this action therefor, but that the evidence neither justified a recovery for rebates upon merchandise shipped during the time that Receiver Smith was operating the road, nor upon the second cause of action.

As the judgment is for a gross sum, and the evidence furnishes no test by which the correct amount may be ascertained, the judgment must be reversed.

Illegal Discrimination by Payment of Rebates.—See *Fitzgerald v. Grand Trunk R. Co.* (Vt.), 49 Am. & Eng. R. Cas. 8, and note 11.

Right of shipper to rebates
—Liability of company.

CHICAGO, ST. LOUIS & PITTSBURGH R. Co.

v.

WOLCOTT.

(Indiana Supreme Court, January 11, 1895.)

Action Against Railroad Company for Failure to Furnish Means of Transportation—Sufficiency of Complaint—Necessity of Pleading Ability of Company to Furnish Cars.—In an action against a railroad company for failure to furnish cars for the transportation of merchandise, the ability of the company to furnish the cars is a matter of defense, and need not be set out in the complaint.

Same—Pleading Numerous Causes of Action in One Paragraph.—Separate and independent causes of action amounting to several hundred in number, and covering a period of nearly six years, may properly be combined and stated in one paragraph of the complaint.

Same—Indefiniteness—Aided by Verdict.—Indefiniteness in the complaint by reason of general allegations is cured by explicit special findings of the jury.

Same—Burden of Proof of Ability of Company to Furnish Cars.—Allegations that there was no competition against the defendant company at the shipping points of plaintiff, and that the company discriminated against him by refusing to furnish cars, and at the same time furnished cars to others doing business at competing points, is sufficient to throw upon the company the burden of showing why it could not furnish cars when demanded.

Same—Assignability of Right of Action Arising Under Revised Statutes.—The right of action arising under Rev. Stat. (1889, §§ 5185 and 5190), requiring railroad companies to furnish sufficient accommodation for such passengers and property as shall reasonably offer or be offered for transportation, is assignable in so far as it relates to damages for the refusal to transport property.

Sufficiency of Record on Appeal—Waiver of Objections.—Where it is doubtful if a bill of exceptions set out in the transcript is properly in the record, or duly authenticated, the court will entertain the questions raised on appeal if the appellee makes no objections to the defects, but discusses the record as if it were duly authenticated, and the trial judge has certified the bill of exceptions.

Refusal to Suppress Deposition on Trial as Ground for Reversal.—The refusal of the trial court to suppress irrelevant evidence in a deposition is not reversible error.

Proof of Damages—Admissibility of Secondary Evidence of Contents of Shipper's Books.—A witness who has examined the purchasing and receiving books of plaintiff, using an abstract thereof made by him to aid him, may testify as to the contents of such originals for the purpose of showing the nature and extent of plaintiff's damages.

Same—Waiver of Objection to Proof.—A statement by counsel for defendant company that the defendant would not attempt to controvert "the amount received and shipped out, as shown by the statement" of the witness, was a waiver of any objection to his testimony in that respect.

What Constitutes Compulsory Payment of Excessive Freight Charges.—Where a shipper is unable to procure transportation of farm products to market over but one line, payment by him of advances in freight rates made by the company after a tender of the products for shipment and a demand for cars, is not a voluntary payment so as to preclude a recovery back by him.

Same—Statutory Right of Shippers to Recover Back.—The recovery back of such increased rates of freights exacted is authorized by Rev. Stat. 1894, § 5333, which provides that railroad companies shall not, at any time, increase or advance their rates over the rates of freight asked or charged at the time the goods are offered or tendered to the company for transportation.

Proof of Damages—Erroneous Admission of Evidence as to Market Prices—Harmless Error.—The admission of evidence of the value of farm products at the shipping points, while improper, was harmless, for the reason that the special verdict showed that the jury based its findings on the question of damages because of falling markets upon the price of the different products at the points of destination.

Same—Fluctuation of Markets.—Testimony as to the fluctuation of the markets was properly admitted.

Requisites of Right of Action Against Railroad Company for Failure to Furnish Means of Transportation—Necessity of Tender of Freight Charges.—The right to recover for the failure to furnish means for the transportation of merchandise is not defeated because of the failure to pay or tender the amount of freight when the goods are offered for shipment and cars demanded, where, by the custom of the carrier, as evidenced by its bills of lading, the freight is not required to be paid until the delivery of the goods.

Action Against Company—Admissibility of Evidence as to Statements Made by Officers and Agents of Company to Shipper.—Statements made to the plaintiff by officers or agents of the railroad company in relation to furnishing cars and other like matters, was properly admitted in evidence.

Improper Instructions—Harmless Error.—Improper instructions are harmless if the jury makes no finding as to the matters to which the instructions relate.

Estoppel of Company to Deny Liability for Failure to Receive Goods for Carriage Beyond its own Line.—A railroad company may so hold itself out to the public as to make itself liable for not receiving and conveying goods beyond its own line. *Applying Railroad Co. v. Morton*, 61 Ind. 577.

What Constitutes Discrimination Against Shipper by Line Furnishing Sole Means of Transportation—Failure to Furnish Cars.—The fact that plaintiff, who had no other means of shipment, was refused cars by defendant at the same time that it supplied cars freely to other shippers at competing points, was a discrimination for which the company was liable.

APPEAL from Cass county circuit court.

Ross & Ross, for appellant.

Wolcott & McConnell and *Jenkines & Winfield*, for appellee.

HOWARD, J.—This action was brought on the 5th day of June, 1889, in the Jasper circuit court, against the appellant to recover damages for alleged failure to transport grain, hay, and straw from Wolcott, Sesfield, and Remington, Ind., to eastern markets, covering the entire time from September 1, 1883, to June 5, 1889. The venue was by agreement changed from Jasper to Cass county, and on the

Case stated.

4th day of February, 1890, an amended complaint in five paragraphs was filed in the Cass circuit court. The paragraphs are substantially alike, except that each is based upon business done by appellee individually or in connection with other persons. None of such other persons, however, were parties to the judgment in favor of appellee, and none, therefore, are parties to this appeal.

The material allegations of the complaint are: That from the 1st day of September, 1883, the appellee was engaged in the business of buying, for shipment to eastern cities, hay, straw, oats, and other farm products, at the station of Wolcott, in White county, and at other points named.

That, for the purpose of facilitating such business, appellee purchased, built, and maintained hay-barns, presses, elevators, and storehouses, at great expense, to wit, \$50,000.

That the appellant was on said 1st day of September, 1883, and for a long time before, and has ever since been, a corporation engaged in the business of a common carrier and shipper of straw, hay, grain, and other kinds of farm products, from and between said stations of Wolcott, and others named, in the state of Indiana, to Chicago, Louisville, Boston, New York, and other cities named, in the eastern and central parts of the United States; that appellant scheduled its freight rates, without division into parts or interests, to all the cities and towns aforesaid, and also to all the Atlantic-seaboard cities, and to all intervening towns and cities, intermediate between Wolcott and such cities, and has issued shipping-bills without change of cars from Wolcott to all said cities and towns.

That appellant, during all said time, held itself out as a through shipper of such farm products from Wolcott and appellee's said other shipping points to each and every one of the cities and towns aforesaid.

That appellant advertised for freight business, and continuously operated the sole and only line of railroad over which said farm products could be transferred to market during the whole time from said 1st day of September, 1883, until the bringing of this suit, June 4, 1889; that during said time appellant owned and operated a line of railroad from said shipping points directly to Chicago, Columbus, Pittsburgh, and St. Louis, and, in fact, controlled such an interest in, and held such shipping contracts with, what is called the "Pennsylvania system," and with other railways, that no reshipment or re-billing of freight was required between said shipping stations and the cities and towns aforesaid; that during all said time appellant was supplied with cars, engines, and other means and facilities amply sufficient to do all the business over its roads and connecting lines aforesaid.

That appellee was induced to enter into said business of buying and shipping farm products at said stations on the assurance of appellant that it was a common carrier, and would with promptness and diligence transport such products to the markets aforesaid; that appellant held itself out to appellee as a common carrier for hire, on a continuous line from appellee's places of business to the said markets, by a continuous line of transit.

That, relying on said conduct and assurances of appellant, appellee purchased large quantities of said products at Wolcott and other shipping points named during all the said time, the particulars of which, as to amounts, times of purchase, etc., are set out in detail; all of which from time to time, as the same were purchased, was offered and tendered to appellant for shipment, with request for suitable cars therefor, to the several markets aforesaid.

That appellant failed, neglected, and refused to furnish cars as requested, so that appellee had on hand and in store at his said places of business large quantities of said products, all as set out in detail, at times named.

That at the several times when said products were in store and on hand for shipment as aforesaid, appellee demanded of appellant cars and means of transportation, and that appellant transport such products to the cities and towns aforesaid on its advertised line of shipment, demanding such cars as were controlled by the appellant company; which demand the appellant refused and neglected to supply.

That appellee was at all times ready, willing and able to pay to appellant the usual, customary rates for shipment charged by it to the markets aforesaid, but appellant failed and refused to transport said property, or any part thereof, within a reasonable time, and until after so long delay that appellee had to suspend business.

That prices declined, cost of storage and other expenses increased, including use of warehouses, additional expense of handling such merchandise, interest on money invested, additional insurance, and shrinkage of property, which caused appellee great and irreparable damages, all as set out in detail.

That appellant raised and advanced the rate of freight, after the goods were offered for shipment, in amounts and at times as stated.

Other specific allegations of loss are made.

It is further alleged that while grain and hay were being offered for transportation, and while prices were high at the points to which appellee desired to ship, the appellant had, or could have had with reasonable care and diligence, cars sufficient to transmit to such markets all the products aforesaid;

but that appellant failed and refused to supply such cars, but used the same exclusively to take freight at railroad crossings and competing places not contiguous to appellant's line of railroad, and neglected and refused appellee's freight, merely because appellee had no competitive line of railroad on which to ship his hay and grain.

The several items of loss by such decline of prices are set out.

The demand for damages for all losses to appellee for the six years is \$50,000.

Motions were made by appellant, and overruled by the court, to require appellee to separate his complaint into paragraphs.

Of this, counsel say in their brief: "Appellant insists that each and every separate demand of cars, and the refusal to furnish when it was its duty to do so, constituted a distinct and separate cause of action, and that more than one such cause of action cannot properly be stated in the same paragraph of the complaint. The several and independent causes of action, amounting to several hundred in number, and covering a period of near six years, are inserted in one paragraph of the complaint." We are inclined to think that counsel's own statement is a sufficient refutation of their contention on this point. Such a complaint of several hundred paragraphs, as contemplated by counsel, would break down of its own weight. In 1 Chit. Pl. 235, as cited by PERKINS, J., in *State v. McCormack*, 2 Ind. 305, it is stated, that: "In civil cases it is a rule that where a subject comprehends a multiplicity of matter, and a great variety of facts, there, 'in order to avoid prolixity, the law allows general pleading.'" See, also, *Gaff v. Hutchinson*, 38 Ind. 341. Pleading.

The court also overruled a motion to make the complaint more specific. At first appellee depended upon exhibits to the complaint, and upon the recitals in such exhibits, as a sufficient substitute for specific allegation as to the times when, the places from and to which, and the articles and amounts for which transportation was demanded; also, as to values of articles, times at which freight rates were advanced, the length of time articles were delayed in shipment, etc. These exhibits were held by the court insufficient and improper for such purposes, and were stricken out on motion. Afterwards, however, by leave of court, the complaint was so amended that the particulars, as we think, were sufficiently alleged.

The complaint is further attacked in arguing against the ruling of the court on demurrer. We think that the amendment to the complaint above referred to, setting out the par-

Indefiniteness
—Cure by
special finding. particulars as to times when demand was made, and amount and character of freight, supplied any defects that theretofore existed in the complaint. In addition, the observation already made is to be kept in mind, that in a case like this, which comprehends a multiplicity of matter, the law yields to the necessity of the situation, and, to avoid prolixity in the statement of details, general pleading is not only allowed, but is to be commended. The complaint is already as full of details as is desirable. Whatever is not stated is more properly matter of evidence than of pleading. The general facts are sufficiently pleaded. The jury, in their special verdict, made their finding explicit, as to these general allegations, in all cases where there was any finding for appellee. The indefiniteness of the complaint, if any, was thus cured.

Ability to
furnish cars—
Pleading. As to the contention that the complaint should state facts showing that the appellant could furnish cars at the several times and in the numbers required, that was matter for defense. If the company were in fact unable to furnish the required cars without undue interference with its business, or with the rights of shippers at other points, that should be shown by the company. The company held itself out to the appellee and the public generally as a common carrier to the several markets named.

Same. The complaint alleges that there was no competition against appellant at the shipping points of appellee, and that appellant discriminated against appellee by refusing him cars, and at the same time furnishing cars to others doing business at competing points. We think the allegations of the complaint were quite sufficient on this point; and, if there were any reason why appellant could not furnish cars when demanded, appellant should aver the same by way of answer. Appellant knew the conditions of its own business much better than appellee could know it. See *Railway Co. v. Racer*, 5 Ind. App. 209; *Railroad Co. v. Morton*, 61 Ind. 539.

Assignment of
statutory right
of action. It is finally contended that the complaint is defective for the reason that the cause of action arose in favor of appellee jointly with others, and that the interest therein held by those others could not be assigned to appellee, as was here attempted, inasmuch as actions on tort cannot be assigned. It is true that the right of action for mere personal torts, such as assault and battery, which die with the party, and do not survive to his personal representatives, cannot be assigned. The wrong charged as done by appellant in this case is the violation of sections 5185, 5190, Rev. St. 1894 (sections 3925, 3926, Rev.

St. 1881), requiring railroad companies to furnish sufficient accommodation for the transportation of such passengers and property as shall, within a reasonable time previous thereto, offer or be offered for transportation. There is no fine or penalty attached; but the corporation is required to pay the aggrieved party all damages sustained. In *Railroad Co. v. Goodbar*, 88 Ind. 213, it was held that a claim against a railroad company under the statute providing for damages for the killing of stock may be assigned. The measure of the damages in that case was the value of the animal killed. In this case it is the loss to the business and property of appellee occasioned by the failure of the company to transport the property when demanded. In both cases the action is for damages to the owner of property for the wrong done thereto by a railway company in violation of the statute. If the right of action may be assigned in the one case, it may be in the other; and we are of opinion that the right of action in each case, being for damages to property, and not to person, was assignable. See, also, *Patterson v. Crawford*, 12 Ind. 241; *Pom. Rem. & Rem. Rights* (2d ed.) §§ 144, 147; 1 Am. & Eng. Enc. Law, 833; and authorities cited in notes.

Many questions are discussed in relation to the motion for a new trial. It seems to admit of doubt whether the bill of exceptions as set out in the transcript is properly in the record. The transcript fails to show "the usual formula for the beginning of an ordinary bill of exceptions," followed by a recital as to the evidence, as suggested by Judge MITCHELL in the case of *Wagoner v. Wilson*, 108 Ind. 210. Neither is there "the usual formal ending of an ordinary bill of exceptions." In a certificate signed by the judge, the paper in question is called "a bill of exceptions, * * * being the original longhand manuscript of all the evidence." But the longhand manuscript itself is not a bill of exceptions. Rather, as the statute says, it should "have been incorporated in a bill of exceptions," after having first been filed in the clerk's office. In the clerk's certificate, also, the document is styled a "bill of exceptions, * * * containing and being the original longhand manuscript." See *Marshall v. State*, 107 Ind. 173, 6 N. E. 142; *Commissioners v. Huffman*, 134 Ind. 1, 31 N. E. 570. In addition, it appears that the only certificate of the clerk authenticating the transcript is without the seal of the court. Such seal has in a recent case been held necessary. *Conkey v. Conder*, 138 Ind. —, 37 N. E. 132. Appellee has, however, made no objection to these defects, but has discussed the evidence at length, as if the record was duly authenticated. For this reason, therefore, and also for the reason that, by very liberal

Objections to
record on
appeal.

intendment, it may perhaps be said that the certificate of the trial judge has cured the defects referred to, we have concluded to consider the questions raised under appellant's assignment of error, that the court erred in overruling the motion for a new trial.

It is first urged that the court erred in overruling the motion to suppress certain questions and answers in the deposition of Percy S. Taylor. It is claimed that the evidence thus elicited was irrelevant. That would not make the error, if it were one, sufficient to reverse the judgment. *Bischof v. Coffelt*, 6 Ind. 23. But it does not seem that the question is in the record. The court ordered the motion to suppress, together with the rulings of the court thereon, and the exceptions of appellant, to be made a part of the record. Whether such motion, rulings, and exceptions could thus be made a part of the record without a bill of exceptions we need not say; for while the motion to suppress, and the reasons therefor, were set out in full as ordered, yet the rulings of the court and the exceptions of appellant, if any there were, are wholly omitted from the record. It is true that in the general bill of exceptions, when the deposition was offered to be read in evidence, appellant objected to its introduction; but the reasons there given, other than those relating to irrelevancy, rather tend to show that the ruling of the court in admitting the evidence was correct. These reasons show that the appellee was interested in the business even before the assignment of any cause of action was made to him. We have already seen that the fact that the wrong charged against appellant was the violation of a statute which prescribed damages for such violation did not prevent the assignment of a cause of action based on such violation.

It is objected that the court permitted the witness William H. Clark to testify as to the contents of the purchasing and receiving books of appellee, using, while giving his evidence, an abstract of those books made by himself after his examination of the originals. It has been held that where books, records, papers, and entries are voluminous, and of such a character as to render it difficult for the jury to arrive at a correct conclusion as to amounts, balances, etc., accountants may be allowed to examine such books, etc., and testify as to the result. *Hollingsworth v. State*, 111 Ind. 289; *Culver v. Marks*, 122 Ind. 554; *Insurance Co. v. Stout*, 135 Ind. 444.

Besides, we are of opinion that appellant, on the trial, waived the right to insist upon this objection. When the appellee was afterwards on the witness stand, and interrogated

Refusal to suppress evidence in deposition.

Admissibility of abstract of books made by accountant.

as to the same matters, counsel for appellant stated: "The defense will not attempt to controvert the amount received and shipped out, as shown by Mr. Clark's statement." This would seem to have amounted to a withdrawal of all objections made to the character of the evidence given by the witness Clark.

Waiver of
objection to
testimony.

It is next objected that the court permitted the witness Henry Wolcott to testify as to advances made in rates of freight by appellant after there had been a tender of freight for shipment and a demand for cars. It is urged that the payment of such advances made by appellee were voluntary, and cannot therefore be recovered back. We think, in the first place, that it was clearly established that the freight paid was not a voluntary payment. In the printed bill of lading used by appellant was the following condition: "Owner or consignee shall pay, at the rate below stated freight charges before delivery, and according to weights as ascertained by either carrier." Appellee had one alternative, only, according to which he might refuse to pay the freight exacted by appellant; that is, not to ship his farm products to market. If he did ship, however, either he or his consignee must pay the freight before the goods would be delivered. There was nothing voluntary about such a payment.

Voluntary
payment of
freight charges.

Section 5333, Rev. St. 1894 (section 4038, Rev. St. 1881), provides that "the various railroad corporations doing business within the state of Indiana, shall not, at any time, increase or advance their rates of freight, or charge for the transportation thereof from one point to another a sum greater than the rate of freight or charge for transportation asked or charged by said railroad corporations at the time such freight is offered or tendered to said railroad corporations for transportation." If the overcharges made in violation of this section of the statute cannot be recovered back, the statute is itself a nullity. See *Railroad Co. v. Wilson*, 132 Ind. 517, and authorities there collected.

Right to re-
cover back
overcharges.

Neither is it true that the foregoing statute is invalid as being in conflict with the right of congress to legislate upon interstate commerce. It is a regulation to protect shippers doing business in the state from unjust overcharges for transportation.

Validity of
statute—Inter-
ference with
interstate com-
merce.

The admission of certain evidence as to the value, at given dates, of hay and other products at the shipping points, while improper, was harmless. The special verdict shows that the jury based their findings of damage by reason of falling markets upon the price of the different products at the points of

Erroneous ad-
mission of evi-
dence—Harm-
less error.

destination, which was correct. Appellant was not, therefore, harmed by such irrelevant testimony. Testimony as to the fluctuation of the markets was certainly admissible.

Because the amount of the freight was not paid or tendered when the goods were offered for shipment and cars demanded, it is argued that there could be no recovery. That

Necessity of
tendering
freight-charges.

depends on the custom of the carrier. In this case, as we have seen, appellant's own bill of lading shows that freight was not exacted in advance. The owner or the consignee was required only to pay the freight before the goods were delivered to the consignee. It is not contended that the goods were or could be taken from the carrier without payment of the freight due.

There was no error in admitting evidence of statements made to appellee by the officers and agents of appellant in relation to furnishing cars and other like matters. As to

Statements of
officers and
agents.

such things, appellant could speak only by such agents. By its printed rules, and by the spoken words of its officers and agents alone, could appellant communicate with appellee.

Certain instructions were refused by the court, and this is complained of as error. As to some of the instructions so refused, there was, as we think, no error committed; as

Instructions.

to all of them no harm was done appellant, as the jury made no finding of damages on the matters to which the instructions related. The verdict is fully supported by the evidence. Indeed, the jury rejected a large part, fully three-fourths of the claims of appellee, and only allowed that which was not only fully supported by the evidence, but was also unquestionably authorized by law.

The appellant held itself out as a common carrier of such freight as appellee supplied, and to all the points to which appellee desired to ship his products, as alleged in the complaint. Of this there was no question. In *Railroad Co. v. Morton*, 61 Ind., at page 577, the court says: "Doubtless a common carrier may so hold himself out to the public as to make himself liable for not receiving and conveying goods beyond his own line." This, without question, appellant did in this case.

Liability of
company for
not receiving
and conveying
goods beyond
own lines.

It is also clear, as we think, that appellant discriminated against appellee, who had no other means of shipment than by appellant's railroad, and refused to furnish him with cars at the same time that it supplied cars freely to other shippers at competing points.

Discrimination.

We find nothing available for the reversal of the judgment, which is therefore affirmed.

MERCHANTS' DISPATCH TRANSPORTATION CO.

v.

FURTHMANN.

(149 *Illinois*, 66.)

What Laws Control Contracts of Carriage.—The nature, interpretation and effect, of a contract of carriage will be controlled by the laws of the state wherein it is entered into.

Effect of Acceptance of Bill of Lading after Oral Contract of Shipment.—Where goods are shipped under an oral agreement, and before a written contract or bill of lading has been tendered to the shipper, an acceptance of a bill of lading by him without assenting to conditions therein contained, will not conclude him. *Following* Bostwick v. Railroad Co. 45 N. Y. 712.

What Constitutes a Limitation of Liability by Carrier—Unsigned Conditions on back of Receipt.—A receipt for goods delivered to a carrier for transportation called attention to certain conditions limiting the liability of the carrier, contained on its back. *Held*, that the conditions on the back of the receipt were mere notice which did not bind the consignor.

Same—Effect of Statement that Bill of Lading would be given thereafter.—The fact that the receipt stated that a bill of lading would be given thereafter showed that it was not assented to by the consignor as a contract of shipment, and that neither party intended it to be more than a receipt for the goods.

APPEAL from appellate court, first district.

W. H. & J. H. Moore & Purcell for appellant.

Edmund Furthmann and *William M. Johnson*, for appellee.

WILKIN, J.—Appellee sued appellant in the superior court of Cook county to recover the value of certain beer, alleged to have been shipped by him over its line from New York to Chicago, which was spoiled, and lost to the plaintiff, while *en route*. The trial resulted in a judgment for plaintiff for \$299 and costs of suit. This is an appeal from a judgment of affirmance in the appellate court. Case stated.

For the purposes of this decision, the following facts are accepted as established by the judgment below: On the 4th day of May, 1889, Rudolph Oelsner, of New York, sent by one of his truckmen to the defendant's freight depot in that city the beer in question. The truckman received, and returned to Oelsner, the following receipt:

For information and bills of lading, apply at office,
335 Broadway.

"New York, May 4th, 1889.

"Received from Rudolph Oelsner, No. 40 Reade St.,
in apparent good order (except as noted), the follow-
ing packages (contents unknown), marked as in the
margin, subject to the conditions on the back of this
receipt:

<p>Marked</p> <p>F. Furthmann, 169 N. Clark St., Chicago, Ill.</p> <p>Charges \$——.</p>	<p>N. Y. C. & H. R. R. R. May 4, 1889. (20) St. John's Park. Twenty half bbls. beer. Bill of lading given at 335 Broadway, N. Y., May 6, 1889.</p>
Owner's risk.	Hurd.

"Read the conditions on the back of this re-
ceipt. C."

On the back it was stated, "The within-mentioned goods to
be forwarded under the following conditions." Then followed
a number of conditions.

On the 6th of May Oelsner received from the company a
bill of lading as follows:

"New York, May 4, 1889.

"Received from Rudolph Oelsner, 40 Reade St., in ap-
parent good order (except as noted), the following packages,
(contents and value unknown), marked as in the margin, viz.:

Twenty hlf. bbls. beer.

Owner's risk.

Original B/L. given May 6/89.

To be forwarded to Chicago, Ill.

Under the following conditions."

Then follow conditions in the body of the bill of lading,
the same as appear on the back of the receipt, one or more of
which it may be conceded would exempt the carrier from lia-
bility for the loss sued for, if binding on the plaintiff. This
bill of lading was duly signed.

The evidence upon the trial tended to prove, and hence the
verdict of the jury and judgment of affirmance by the appel-
late court have conclusively established the fact, "that, prior
to the reception of the goods, the carrier agreed with the
shipper to transport them in 'cold service,' and before any
bill of lading was made, had shipped the goods."

The contract of carriage having been entered into there,
the laws of New York will control as to its nature, interpreta-

tion, and effect. Authorities need not be cited in support of this proposition.

It was said in *Kirkland v. Dinsmore*, 62 N. Y. 171: "It has been repeatedly adjudged in this state that the acceptance by the shipper, on the delivery of the goods for transportation to the carrier, of a receipt or bill of lading signed by the carrier, expressing the terms and conditions upon which they are received and are to be carried, constitutes, in the absence of fraud or imposition, a contract controlling the rights of the parties." The general rule thus stated has, so far as we know, been uniformly adhered to by the courts of that state.

It was, however, decided in the case of *Bostwick v. Railroad Co.*, 45 N. Y. 712, that where goods were shipped under a verbal agreement, before any written contract or bill of lading had been tendered to the plaintiff, the subsequent acceptance of a bill of lading, without assenting to its conditions, would not conclude the shipper. It was there said: "There was no contradiction attempted of the evidence of the plaintiff that he made a verbal contract with Cooke for the transportation of the fifty-four bales through to New York by 'all rail,' and agreed to pay the all-rail rate. The goods were shipped under this verbal agreement before any written contract or bill of lading had been tendered to the plaintiff." "The verbal agreement had been acted upon, and under it the plaintiff had parted with all control over his goods. The rule that prior negotiations are merged in a subsequently-written contract does not apply to such a case as this." It the plaintiff had expressly assented to the terms of the bill of lading subsequently delivered to him, such assent would operate as a change of the terms of the contract originally made, and under which he had parted with his property. But after the verbal agreement had been consummated, and rights had accrued under it, the mere receipt of the bill of lading, inadvertently omitting to examine the printed conditions, was not sufficient to conclude the plaintiff from showing what the actual agreement was under which the goods had been shipped." The doctrine is recognized in *Germania Fire Ins. Co. v. Memphis & C. R. Co.*, 72 N. Y. 90. See, also, *Swift v. Steamship Co.*, 106 N. Y. 206, 30 Am. & Eng. R. Cas. 105.

The scope of the latter decision on this point is accurately stated in the syllabus, as follows: "The parties made a special contract as to the transportation of the oil. Two months after its delivery at Panama, the common agent of the defendant here executed bills of lading, which were sent to plaintiff, but were not received until after the oil had left Aspinwall.

The contract, as set forth in the bill, was different from that actually made. *Held*, that defendant could not alter or abrogate the contract actually made by issuing bills of lading; and, in the absence of proof establishing that plaintiff consented to accept the bills in place of the prior contract, the latter must control."

Leaving out of consideration, then, the receipt of May 4th, the rights of the parties would clearly be controlled by the above-mentioned verbal agreement. But counsel for
 Effect of re-
 ceipt. appellant contend that that receipt, with its conditions, became the contract of the parties, at its date, when the goods were delivered, and continued to be the contract until May 6th, when the bill of lading was delivered, during which time the goods were *en route*, and therefore the doctrine of the Bostwick Case has no application. Upon the facts of the case, we are clearly of the opinion that the paper delivered by the carrier to the shipper on May 4th was in no sense a contract of shipment. If, as is contended, the receipt of May 4th and bill of lading of the 6th are identical in their legal effect, and the former was intended by the parties as a contract of shipment, the question naturally arises, why was the bill of lading made? If the parties intended the receipt to be the contract of shipment, with the same conditions as the bill of lading afterwards delivered to the shipper, why were the conditions not put in the receipt, as they were in the bill of lading, instead of being merely printed on the back of it, and referred to? The proper construction of the two papers is essentially different. The receipt is an attempt by the carrier to limit its common-law liability by notice. *Transportation Co. v. Newhall*, 24 Ill. 466; *Railroad Co. v. Hale*, 6 Mich. 244; *Newell v. Smith*, 49 Vt. 255; *Ayres v. Railroad Corp.*, 14 Blatchf. 9, Fed. Cas. No. 689; *Prentice v. Decker*, 49 Barb. 21; *Limburger v. Westcott*, *Id.* 288; *Express Co. v. Purcell*, 37 Ga. 103; *Railroad Co. v. Manufacturing Co.*, 16 Wall. 318.

In the latter case, the carrier gave a receipt for goods as follows: "Received from V. & M. Bostwick, as consignor, the articles marked, numbered, and weighing as follows [wool described]. To be transported over said road to the depot in Detroit, and there to be delivered to —, agent or order, upon the payment of the charges thereon, and subject to the rules and regulations established by the company, a part of which notice is given on the back thereof. This receipt is not transferable. Hastings, Freight Agent." On the back was printed the following: "The company will not be responsible for damages occasioned by delays, storms, accidents, or other causes, * * * and all goods and merchandise will be

at the risk of the owner thereof while in the company's warehouse, except such loss or injury as may arise from the negligence of the agents of the company." The action was for a loss of the wool by fire, while in the depot at Detroit. Justice DAVIS, delivering the opinion of the court, passing upon the effect of the receipt, said: "It is insisted, however, by the plaintiffs in error, if they are not relieved from liability as carriers by the provisions of their charter, that the receipt taken by the consignor, without dissent, at the time the wool was received, discharged them. The position is that the unsigned notice printed on the back of the receipt is a part of it, and that, taken together, they amount to a contract binding on the defendant in error." After referring to the cases holding that a carrier can, by special contract assented to by the shipper, limit his liability, he holds that the receipt and notice did not amount to such a contract, and says the weight of authority is against its validity. Justice BREESE, rendering the opinion of this court in the *Western Transportation Case*, *supra*, speaking of the receipt there relied upon, said: "No distinction has been attempted to be made, nor can be made, between a public notice in the newspapers, or by handbills, or otherwise, and the notice conveyed by this receipt, it being printed on the back of it, for, wherever it may be found, it is but notice."

Bills of lading are both receipts and contracts to carry. "So far as they acknowledge the delivery and acceptance of the goods, they are mere receipts; as to the rest, they are contracts." Hutch. Carr. 122. If the contention of appellant is correct, the paper of May 4th is a receipt for the goods, with a contract to carry upon certain conditions printed on the back of it signed by no one. We are clearly of the opinion that such a receipt should not be given the legal effect of a special contract, limiting a public carrier's common-law liability. No good reason can be shown why, if the intention is to so contract with the shipper in good faith, the conditions should not be embodied in the contract, and properly signed, as was done in the bill of lading dated May 6th, and this we understand to be in harmony with the decisions in New York. There the court of appeal has, as before stated, held that where the conditions are embodied in the receipt or bill of lading, as in *Belger v. Dinsmore*, 51 N. Y. 166, the acceptance of the paper is conclusive evidence of the fact that the shipper knew its contents, and assented thereto, but we have been able to find no decision of that court giving such a construction to a mere receipt calling attention to conditions on the back of it. On the contrary, it has there been uniformly held that the liability

Effect of statement as to bill of lading.

cannot be restricted or limited by notice, whether brought home to the shipper or not. Moreover, the receipt of May 4th bears upon its face a refutation of the idea that the shipper assented to it as a contract of shipment. It states that a bill of lading is to be given thereafter. That fact also shows that neither party intended it to be more than a receipt for the goods. The evidence as to the custom of the parties in like transactions tends to support this view, and the appellate court have so found the fact.

In our opinion the transaction, as evidenced by the two papers, shows on its face that the only contract of shipment ever made between the parties in writing was the bill of lading issued after the goods had been shipped, and that the case is clearly within the rule announced in *Bostwick v. Railroad Co.*, *supra*. The judgment will be affirmed.

Judgment affirmed.

Exemption from Liability—Law of Place.—See *Otis Co. v. Missouri Pacific R. Co.* (Mo.), 55 Am. & Eng. R. Cas. 636, and note 642; *Hazel v. Chicago, Milwaukee & St. Paul R. Co.* (Iowa), 49 Am. & Eng. R. Cas. 76, and note 80.

Validity of Stipulations Limiting Carrier's Liability.—See *Louisville & Nashville R. Co. v. Wynn* (Tenn.), 45 Am. & Eng. R. Cas. 312, and note 319.

Limitation of Carrier's Liability—*Right of Carrier to Limit Liability for Negligence.*—In *Rathbone v. New York Cent. & H. R. R. Co.*, 140 N. Y. 48, it was held that a stipulation in a contract of carriage limiting the liability of the carrier will not relieve it from liability for its own negligent acts. The court said: "It is well settled that these stipulations in the contract will not be construed to relieve the carrier from liability for his own negligent acts. His duty and obligation to exercise a proper degree of care of the property while in his custody is not affected by them. Full and sufficient scope is given to their operation when it is held that they exempt the carrier from his common-law responsibility as an insurer of the property. It is not reasonable to suppose that the parties intended to contract that a bailee for hire might with impunity be careless and remiss in the discharge of the trust reposed in him. If such a result is intended, it must be so stated expressly and unequivocally in the contract. General words are not sufficient. *Magnin v. Dinsmore*, 56 N. Y. 168; *Mynard v. Railroad Co.*, 71 N. Y. 180; *Nicholas v. Railroad*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Jennings v. Railroad Co.*, 127 N. Y. 438, 49 Am. & Eng. R. Cas. 98."

See, also, *Thomas v. Wabash, St. L. & P. R. Co.* (Lancaster Mills, etc., Intervener) (U. S. Cir. Ct., S. D. Ill., Sept. 24, 1894), 63 Fed. Rep. 200.

Necessity of Proof of Carrier's Negligence.—In *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, it was held that a carrier of goods may limit its liability except as against its own negligence, but that in that event its liability depends upon the proof of negligence in fact.

Right of Carrier to Relieve Itself from Liability if True Value of Shipment is not Stated.—In *Rathbone v. New York Cent. & H. R. R. Co.*, 140 N. Y. 48, it was held that where property transported is of unusual or extraordinary value, a notice contained in a shipping receipt that the carrier will not be responsible for loss if the true value of the articles are not stated at the time of shipment unless extra freight is paid, will operate to exempt the carrier from liability, even for its own negligence, unless it is informed

at the time or before the goods are received that they are of special or unusual value. *Citing Magnin v. Dinsmore*, 62 N. Y. 85.

Effect of Illinois Statute Prohibiting Limitation of Common-law Liability on Contract for Carriage between Other States.—In *Thomas v. Wabash, St. L. & P. R. Co.* (Lancaster Mills, etc., Intervener) (U. S. Cir. Ct., S. D. Ill., Sept. 24, 1894), 63 Fed. Rep. 200, it was held that the Illinois statute (May 27, 1874), which provides: that “whenever any property is received by a common carrier to be transported from one place to another within or without this state, it shall not be lawful for such carrier to limit his common-law liability safely to deliver such property at the place to which the same is to be transported, by any stipulation or limitation expressed in the receipt given for such property” has no binding effect on a contract of carriage made in Tennessee by a railroad company chartered by the laws of Illinois for the carriage of goods to Massachusetts.

Validity of Requirement of Presentation of Claim for Loss within Specified Time.—In *Central Vermont R. Co. v. Soper* (U. S. Cir. Ct. App., 1st Cir., Jan. 12, 1894), 59 Fed. Rep. 879, it was held that a provision in a bill of lading exempting the carrier from liability in any case or any event for loss or damage unless a written claim therefor is presented within 30 days thereafter is void where the transit is intended to be a long one, as from Chicago to Boston, because liable to defeat valid claims notwithstanding the best of diligence and good faith on the part of the consignees. *Distinguishing Express Co. v. Caldwell*, 21 Wall. 264. The court said: “The fundamental proposition that parties exercising the *quasi* public functions of common carriers cannot, at their pleasure, impose conditions beyond those which the law imposes, is too well settled to need elaboration, resting, as it does, both upon general grounds of public policy, and upon the fact that a shipper of merchandise does not ordinarily stand on an equal footing with the carrier. Yet it must be confessed that where bills of lading are in printed form like those at bar, and therefore apparently in common use, and no suggestion is made that they are not in such use, and no suggestion that there has been any public or private complaint touching them, although, on account of their general use, the stipulations must be well known to ordinary shippers, this court should be well satisfied, before holding that clauses as to which there has been no line of decisions by other courts, or of expressions by the text writers, are unreasonable, and therefore void.

“We must take this provision in its consolidated form. As such, it relates, not only to such portion of the transit as is carriage at common law, but also to such portion as is warehousing. If the provision had been limited to the latter, the position might be different; but, as it stands, we must test it with reference to the former. So, also, it covers, not only damage, but loss. If it had been limited to damage, and this with reference to the time when the damage was ascertained, or when the merchandise came into the hands of the consignee, it might all be valid, on the same principle on which, in many jurisdictions, it is held a reasonable state of the law to require that a person claiming a warranty cannot, after receipt and opportunity to inspect the merchandise purchased, set up a breach on account of what was patent, or what might have been discovered. But in the case at bar the provision relates, not only to damage ascertainable on the arrival of the goods, but also to damage wherever occurring, and to loss wherever occurring. The court cannot fail to take judicial knowledge of the fact that on bills of lading like these, with a right to hold at Ogdensburg for orders, the entire transit may not unreasonably consume the whole of 30 days. As the damage, or even the loss of part, might be in the early stages of the transit, it is not unreasonable to suppose that it might well happen, in many ordinary cases, that the loss or damage will fail to even come to the knowledge of the consignee within the short period named for

giving notice of his claim. Moreover, the delay involved in correspondence touching occurrences over so long a transit, coupled with the unreasonableness of requiring that in the event of loss or damage the consignee should at once go upon the route, in lieu of availing himself of the usual methods by mail, must in many cases, in the ordinary course, be so great as to enable the court to assume that the time named would not ordinarily give reasonable opportunity for investigation, so far as to enable consignees to state properly a written claim, or even to know against whom the claim should be made. *Express Co. v. Caldwell* [21 Wall. 264], does not directly aid the court on this point, because there the carriage covered ordinarily but a single day, and the time allowed for giving the notice was 90 days from delivery to the express company; but the line of argument in that case is impliedly against the reasonableness of the period of 30 days allowed in the case at bar.

"On the whole, without attempting to balance the conflicting decisions relative to matters of this sort, which would be of no advantage, especially as the circumstances are so apt to differ, the court is satisfied that, in view of the consolidated form of this provision, the portion of it which requires a written claim for loss or damage to be made within 30 days after the loss or damage occurs, covering a transit which may be expected to be so long as this one may be, is so liable to defeat valid claims, notwithstanding the best of diligence and good faith on the part of the consignees, that it must be held void. The ruling of the court below in this particular was correct, but the other limitation of three months contained in the same bills of lading cannot be so clearly criticized."

Validity of Provision Limiting Action for Loss or Damage.—In *Central Vermont R. Co. v. Soper* (U. S. Cir. Ct. App., 1st Cir., Jan. 12, 1894), 59 Fed. Rep. 879, it was held that a provision in a bill of lading that the carrier should not be liable in any case or event unless an action in which a claim for loss or damage was sought to be enforced, should be brought within three months after such loss or damage accrued was valid, if the parties agreed to it without protest, and it appeared that such provisions were in common and public use with general acquiescence, and unless its application in a given case would be unreasonable under the particular facts of that case. The court said: "*Riddlesbarger v. Insurance Co.*, 7 Wall. 386, is directly in point that the limitation of the time of suit to three months, contained in these bills of lading, is not invalid on the mere ground that it contravenes the statute of limitations; and this case, with *Express Co. v. Caldwell*, 21 Wall. 264, seems to be sufficient to justify the court in holding that this limitation is not invalid, provided it is not in its nature unreasonable. Neither of these decisions, however, nor any other which binds this court, goes further than this in aiding this court in the case at bar. Parties having agreed to this provision without protest, and, as already said, the bills of lading being apparently in common and public use, with apparent general acquiescence, it would seem to rest on the court to sustain the provision, unless it find it unreasonable; and such is the state of the law, in any event."

Presumption as to Payment of Moneys by Carrier to Shipper—Assumption of Risk or Rebate—Conflicting Evidence.—In *Thomas v. Wabash, St. L. & P. R. Co.* (Lancaster Mills, etc., Intervener) (U. S. Cir. Ct., S. D. Ill., Sept. 24, 1894), 63 Fed. Rep. 200, the evidence was conflicting as to whether moneys paid by the carrier to the shipper was in consideration of an assumption of the risk of fire by the latter, or was a rebate obtained on the shipment, and it was held that there was a presumption that the moneys so paid were in the nature of a rebate.

JASPER TRUST CO. v. KANSAS CITY, MEMPHIS & BIRMINGHAM R. CO.**SOUTHERN EXPRESS CO. v. JASPER TRUST CO.**(99 *Alabama*, 416.)

Liability of Carrier to Bona-Fide Holder of Bill of Lading.—The indorsee and transferee of a bill of lading who parts with value and becomes the innocent holder thereof without notice, may hold the carrier responsible for the truth of its recitals, and for damages to the extent of his advances on the faith of its genuineness and truth as a bill of lading.

Same—Estoppel of Carrier to Deny Receipt and Possession of Goods.—As between a railroad company and a person who shows himself a *bona-fide* transferee and purchaser of a bill of lading, the company is estopped from denying that it received and holds the goods specified in the bill of lading.

Effect of Statute Subjecting Carrier to Liability to Transferee of Bill of Lading—Negotiability.—A statute (Code 1886, § 1179) which gives the right to endorse and transfer bills of lading and subjects carriers to liability to the holders thereof does not raise an endorsed bill of lading to the plane of bills of exchange or other negotiable instruments, although the endorsement is proof of the changed ownership of the property represented thereby.

Fraudulent Issue of Bill of Lading to Fictitious Person—Duty of Transferee to Make Inquiries—Liability of Carrier.—A bill of lading was issued by an agent of an express company to a fictitious firm, the same endorsed by him in the name of such firm, and moneys obtained thereon from plaintiff. *Held*, that as plaintiff acquired no rights except those conferred by the endorsement it was put upon inquiry as to the existence of the firm, and that its failure to institute proper inquiries was a bar to any claim for damages which it might assert against the carrier.

Liability of Express Company for Moneys Fraudulently Procured to be Carried and Thereafter Embezzled by its Agent.—An agent of an express company by fraud and false pretense procured plaintiff to deliver money to an express company for carriage and delivery to a fictitious firm. The company received the money, carried it, and delivered it at the designation specified, where it was embezzled by the agent, who had invented the scheme for the purpose of getting possession of it. *Held*, that plaintiff was entitled to recover, since the money, though embezzled, was constructively in defendant's possession.

MCCLELLAN, J., dissenting.

APPEAL from Walker county circuit court.

The causes of action in each of these two cases arose out of the same transaction, and, being so intimately connected, they were considered together.

In the first case the Jasper Trust Company sued the Kansas City, Memphis & Birmingham Railroad Company to re-

cover damages alleged to have been suffered by the plaintiff by reason of the alleged issue of a fraudulent bill of lading by an agent of the said railroad, said bill of lading acknowledging the receipt of 30 bales of cotton, on the faith of which receipt and acknowledgment the plaintiff advanced the amount for which the action was brought, no cotton, in fact, having been received by the defendant. In this case there was judgment for the defendant, and plaintiff appeals. In the second case the Jasper Trust Company sued the Southern Express Company for the failure to deliver a package of money to R. H. Sandford & Co.

There was judgment in this case for plaintiff, and defendant appeals. Both of the judgments are affirmed in this court.

The facts in each case are sufficiently stated in the opinion.

In the case against the Kansas City, Memphis & Birmingham Railroad, the defendant, after the introduction of all the evidence, requested the court, in writing, to give the general affirmative charge in its behalf. The court gave this charge, and the plaintiff duly excepted.

In the case against the Southern Express Company the complaint contained two counts. The first seeks to recover for the failure of the defendant to deliver certain moneys sued for, which were delivered to it, as a common carrier, to be delivered to R. H. Sandford & Co. The second count claims the same sum for money had and received.

Upon the introduction of all the testimony, the court, among other things, instructed the jury as follows: "If D. R. Sandford, being the agent of the railroad company, made out and signed the bill of lading in question for the purpose of defrauding or imposing on plaintiff, without having any cotton for shipment thereunder, or expecting to have any, but that the bill of lading was spurious and fraudulent, and if D. R. Sandford fraudulently procured plaintiff to ship the money to R. H. Sandford & Co., and if D. R. Sandford, as agent of defendant, received the money, it was his duty, as agent of defendant, to hold the money, when it came into his hands as agent of the express company, for the use of plaintiff, and, if he failed to so, the defendant is liable in this action." The defendant excepted to this portion of the court's general charge, and also separately excepted to the court's refusal to give each of the following charges requested by it: (1) "It was the duty of the Jasper Trust Company to ascertain with whom it dealt, and in shipping money to R. H. Sandford & Co., at their request, it was the duty of the Jasper Trust Company to ascertain with whom it dealt, and who R. H. Sandford & Co. was; and if, by failure to make such proper and necessary inquiries, the money was delivered to a fictitious

firm, then the plaintiff has no right to a verdict." (2) "If the jury believes from the evidence that D. R. Sandford, or D. R. Sandford and his brother, composed the firm of R. H. Sandford & Co., and if the jury further believe that the money was delivered to D. R. Sandford for R. H. Sandford & Co., then the Jasper Trust Company is not entitled to a verdict." (3) "The burden of proving that the money was not delivered to R. H. Sandford & Co. is on the plaintiff; and if the plaintiff, the Jasper Trust Company, has failed to prove that the money was not paid over or delivered to R. H. Sandford & Co., the verdict must be in favor of the Southern Express Company." (4) "If D. R. Sandford, under the name of R. H. Sandford & Co., wrote the Jasper Trust Company to send the money, and Jasper Trust Company sent the money to R. H. Sandford & Co., and D. R. Sandford received the money from the express company, then the express company is not liable." (5) "If the jury believe the evidence, they must find a verdict in favor of the defendant, the express company.

Coleman & Sowell, for appellant Jasper Trust Co.

Wallace Pratt and Hewitt, Walker & Porter, for appellee Kansas City, M. & B. R. Co.

J. J. Altman, for appellant Southern Exp. Co.

Coleman & Sowell, for appellee Jasper Trust Co.

STONE, C. J.—These two cases are so intimately connected with each other that we will consider them together.

The Jasper Trust Company, located at Jasper, was engaged in banking. On the Kansas City, Memphis & Birmingham Railroad, distant from Jasper some 60 miles, is a railroad station known by the name of Sulligent, and the Southern Express Company has an office there. D. R. Sandford was a depot agent of the railroad at that place, and was also agent of the express company; he filling both offices at that station. On September 9, 1890, D. R. Sandford, as agent of the railroad company, signed a bill of lading, using one of the railroad's blanks, by which he acknowledged to have received from R. H. Sandford & Co. 30 bales of cotton, weighing 15,000 pounds, in apparent good order, to be delivered to Barry Thayer & Co. at Boston, Mass. On the back of this bill of lading is this indorsement, without date: "Deliver to Jasper Trust Co. R. H. Sandford & Co." The original bill of lading has been sent up, under the trial court's order, for our inspection. We find a very striking resemblance and similarity in the two signatures,—D. R. Sandford to the bill of lading, and R. H. Sandford Co. to the indorsement.

Soon after the issue of this receipt, a draft was drawn on

Barry Thayer & Co., Boston, Mass., bearing the signature of R. H. Sandford & Co., for a sum approximating the value of 30 bales of cotton, in favor of the Jasper Trust Company; and this draft, with the bill of lading attached, and indorsed to it as copied above, were forwarded to the trust company, and by it discounted. That company thereupon attempted to remit the proceeds of the draft (something over \$1100) to R. H. Sandford & Co. at Sulligent, and to that end delivered the money to the Southern Express Company, taking its receipt and obligation to pay and deliver the same to R. H. Sandford & Co. Soon afterwards D. R. Sandford, the agent alike of the railroad and the express company, absconded, carrying with him said sum of money, together with other moneys obtained by similar practices.

The bill of lading acknowledging the receipt of the 30 bales of cotton to be shipped was false and fraudulent, no cotton in fact having been received. Nor was there such a firm as R. H. Sandford & Co. The entire transaction was planned and carried into effect by D. R. Sandford, the agent. He issued the false bill of lading; issued it to R. H. Sandford & Co., when there was no such firm or business house. He indorsed the pretended name of this fictitious firm on the bill of lading, to give it negotiability, and to enable him to consummate his fraudulent scheme. The money consigned to this fictitious firm, in due course of business, came to him as the express company's agent at Sulligent, and he did not deliver it to R. H. Sandford & Co. He could not, for they were a fiction.

The Jasper Trust Company instituted these two suits,—the one against the railroad company for the nondelivery of the 30 bales of cotton. This suit, under the trial court's ruling, terminated in favor of the defendant. The facts were all agreed on, and at the written request of the defendant, the railroad company, the court charged the jury that, if they believed the evidence, they should find for the defendant. They so found.

There can be no question that before February 28, 1881, the trust company was without right to maintain this action.

Nature of bill of lading—
Negotiability. Advancing money on a false bill of lading given by the railroad's agent would have placed them upon no higher ground than the person to whom it was improperly issued would have occupied. It was in no sense a negotiable instrument. *Moore v. Robinson*, 62 Ala. 537.

On February 28, 1881 (Sess. Acts, p. 133), the act was approved, "to prevent the issue of false receipts," etc. The principles of that statute have carried into the Code of 1886, commencing with section 1175. We quote from section 1179:

"If any common carrier, not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received, * * * such carrier * * * or person is liable to any person injured thereby for all damages, immediate or consequential, therefrom resulting."

An argument, prepared with great labor and research, has been submitted by the appellee. Its contention is that, while D. R. Sanford was the accredited depot agent to execute bills of lading for freight to be transported on the railroad, he had no authority to execute such bills unless the thing or merchandise to be transported was in fact received; that, as the cotton specified in the bill of lading was not received, Sanford transcended his delegated authority when he gave the receipt, and fastened no liability on the railroad company. This ingenious argument is followed by many citations of authority.

In the absence of our statute, the foregoing argument would be conclusive. The bill of lading not being, in any sense, a negotiable instrument, the indorsee could assert no greater rights than the indorser could have asserted. 2 Am. & Eng. Enc. Law, 241, and notes. The argument claims that our statute has wrought no change in this rule.

It seems to us that a full answer to this contention is found in the fact that such interpretation would practically annul that part of the statute which we have copied. Corporations are artificial entities or things, and can act only through human agency. Deny to them this agency, and they are left without power to do any act or to achieve any result. The depot agent, in executing a bill of lading, is the railroad company speaking through him. His delegated power is restricted, it is true, for he is authorized to receipt for freight only when the freight is actually delivered to the railroad. But agents are sometimes false to their trusts, and injury to innocent outsiders is the consequence. It was this which rendered the statute under consideration necessary, and caused its enactment. The legislature realized that carriers or their agents might be negligently or intentionally derelict, and that damage, immediate or consequential, might result therefrom. To visit the loss thus occasioned on the carrier was simply placing the penalty where personal fault, or that of an agent, had caused the injury to be inflicted. Not to give the statute this interpretation is to deny to it all operation when a corporation is the carrier. Its whole intention was to punish and prevent the giving of a bill of lading when the property or thing was not in fact received for transportation; and, if we limit the carrier's lia-

Estoppel of
carrier.

bility to cases in which the property or thing receipted for is actually received, do we not leave the statute without any purpose to be accomplished? Its language is: "Not having received things or property for carriage, shall give or issue a bill of lading, or receipt, as if such things or property had been received." This makes the statute precisely applicable to the case we have in hand, and not to give it such construction would be to deny it all operation as against corporations.

Our statute was preceded by statutes on the same subject alike in England and in many of the states of this Union. See them referred to in 2 Am. & Eng. Enc. Law, 241, 242, and notes. It was enacted to prevent frauds sometimes perpetrated through spurious bills of lading. It was not intended to make them negotiable instruments, like bills of exchange. Though transferable "by indorsement and delivery, it does not follow that all the consequences incident to the indorsement of bills and notes before maturity ensue, or are intended to result, from such negotiation." The statute must not "be construed as altering the common law, or as making any innovation therein, further than the words import." *Shaw v. Railroad Co.*, 101 U. S. 557.

A bill of lading regular on its face, and issued by a carrier or its authorized agent, is a certificate that the person to whom it is issued is the shipper of the property or goods therein described, and that they really exist, and are subject to the order and direction of the shipper, unless the bill of lading furnishes notice that such is not the fact; and our statute is authority for any one to deal with the person to whom such bill of lading is issued, on the basis and postulate that the property or goods in fact exist, are in the possession of the carrier, and subject to the conditions expressed in the bill of lading. Any one to whom such bill of lading is indorsed and transferred by the person to whom it was issued, and who parts with value and becomes the innocent holder of it without notice, may hold the carrier responsible for the truth of its recitals, and for damages to the extent he may have advanced on the faith of its genuineness and truth as a bill of lading. Code 1886, § 1179, last clause. As between the railroad company and any one who shows himself a *bona-fide* transferee and purchaser of the bill of lading, the corporation is estopped from denying that it received and holds the cotton specified in the receipt.

Still, as we have said, such indorsed bill of lading is not raised to the elevated plane of bills of exchange and other negotiable instruments. A bill of exchange payable to a fictitious person may, under some circumstances, be negotiable, and the holder, if without notice and for value, may be pro-

ected against defences, original or intermediate. 1 Daniel, Neg. Inst. § 136 *et seq.* This principle, however, cannot, and does not, apply to bills of lading. They are not transferable by delivery, and possession of them by any person, of whose ownership the writing furnishes no proof, raises no presumption of change of property in the thing receipted for. The statute makes no express provision for their indorsement or transfer, but it is alike natural and reasonable that any one who claims to have succeeded to the ownership of the chattels or things expressed in the writing must furnish the proof of such changed ownership. Indorsement will accomplish this. Who can indorse? Only the person to whom the bill of lading is given,—the person the paper declares to be the owner and shipper, or his authorized agent. The power exists in no one else; and if any outsider, having no authority therefor, attempt to indorse or otherwise transfer it, no title or right to the property or things therein expressed is thereby transferred or incumbered. It is unlike a bill of exchange or negotiable note which is perverted to a use other than that to which, by the terms of the agency, it was alone authorized to be applied. *Saltmarsh v. Tuthill*, 13 Ala. 390.

Negotiable
character of
bill of lading.

The question then comes up, Who can transfer a bill of lading, or incumber it, so as to vest a title or right in the transferee? Manifestly, this can be done only by the person to whom it is issued, or with his authority. If a stranger obtain unauthorized possession of it, and pervert it to unauthorized uses, no one who trusts such stranger, and parts with value on the strength thereof, can claim damages of the carrier for the injury he may thereby have suffered. It would be his own fault and folly if he dealt with one having no authority in the premises. He should have inquired.

Duty of en-
dorsee to in-
quire.

The bill of lading in the present case was issued to a fictitious firm. There was no such company as R. H. Sandford & Co. That name indorsed on the bill of lading imported nothing,—represented nothing. The Jasper Trust Company acquired no rights from R. H. Sandford & Co., for, being only an imaginary firm, it could neither have nor transfer rights. The bill of lading being drawn in favor of the person or firm having no real existence, how could it confer any rights on another? Manifestly, having no existence, it neither did nor could confer rights; neither did nor could indorse the bill of lading; and the Jasper Trust Company, acquiring no rights save those conferred on it by the indorsement, was necessarily put on inquiry as to who were R. H. Sandford & Co. That inquiry would have led to the discovery that there was in fact

no such firm, but that it was a fiction and a myth. The railroad company has done the Jasper Trust Company no legal wrong of which the latter company can complain. Its failure to inform itself whether there was such a firm as R. H. Sandford & Co.—its failure to obtain an indorsement of the bill of lading from the person or firm to which it was issued—is a bar to any claim of damages it may assert against the railroad company.

The second suit was against the express company, to recover the money intrusted to it. We have seen that the trust company or bank was made the victim of fraud and false pretence. No 30 bales of cotton were in fact delivered to the railroad company, and there was no such firm or company as R. H. Sandford & Co. If there had been such a company, and the express company had delivered the package of money to it before notice given not to pay, then the express company would have performed its whole contract, and the trust company would be without remedy. Such is not this case. *Yarborough v. Wise*, 5 Ala. 292; *Wilson v. Sergeant*, 12 Ala. 778.

In the first of these cases—that of the Kansas City, Memphis & Birmingham Railroad Company—the facts were agreed on, and it was admitted there was no such firm as R. H. Sandford & Co. There was no agreement in the case against the express company as to what the facts were. It was tried on testimony adduced. We have examined the transcript with care, and have narrowly scrutinized the testimony, all of which is set out in the bill of exceptions. The proof is full that D. R. Sandford, the agent, did all the writing and corresponding which purports to have been done in the name of R. H. Sandford & Co. The proof is quite full that there was no such firm as R. H. Sandford & Co., while there was not a semblance of proof that there was, or ever had been, such company. We make this statement because it constitutes an important factor in pronouncing on one or more of the charges requested.

According to the testimony, if believed, the simple and naked facts of this case may be summarized as follows: Through the fraud and false pretence of D. R. Sandford, the Jasper Trust Company was induced to deliver its money to the Southern Express Company to be carried and delivered to R. H. Sandford & Co. at Sulligent. The express company received and receipted for the package, carried it to Sulligent, where it was received by the express company's agent, and by him converted and embezzled. The express company has never performed the contract it entered into, by paying the money to R. H. Sandford & Co., or to any one else authorized

Liability of
company for
money em-
bezzled.

to receive it. The present suit is brought to recover that money as still constructively in the possession of the express company.

It is elementary law that if one, through mistake of fact, false representation, or fraud, obtain money from another, an action lies to recover it back, on the simple principle that the one has money which *ex aequo et bono* belongs to another. 2 Daniel, Neg. Inst. § 136 *et seq*; Bish. Cont. § 226; 1 Pars. Cont. bottom page 496; 3 Rand. Com. Paper, § 1485; Rutherford *v. McIvor*, 21 Ala. 750; 1 Brick. Dig. p. 140, § 72; Wilson *v. Sergeant*, *supra*. So, if money be transmitted through fraudulent procurement, and, while the money is in transit, the fraud is discovered, and the bearer or carrier is notified not to deliver, then such bearer or carrier becomes the custodian of the money for the use and benefit of him who remitted it, and is liable to account to him therefor. But, after delivery, demand and notice come too late. The rule in such case is, to this extent, analogous to that which obtains in stoppages *in transitu*. 2 Am. & Eng. Enc. Law, 855; Bish. Cont. § 802.

That part of the court's general charge to which exception was reserved is in precise accordance with our views, and is free from error. For the same reason the first charge asked was rightly refused. The second charge asked was abstract, in that there was no testimony to support it. No testimony offered tended to show that D. R. Sandford was a member of the firm of R. H. Sandford & Co., or in fact that there was such firm. It was proved to be fictitious. This charge was rightly refused for this reason. 3 Brick. Dig. p. 113, § 106. There is nothing in the other charges.

On the case made by the testimony, giving full weight to everything claimed by defendant as in its favor, the trial court would have been justified in giving the general charge in favor of the plaintiff. Such being the case, we will not inquire specially into the court's rulings in receiving testimony offered by plaintiff. Whether some portion of it was material or not, it neither strengthened plaintiff's case in any material point, as shown by the unchallenged testimony, nor could it weaken the defense attempted to be made. In such conditions it is not a reversible error to receive illegal testimony. Seymour *v. Farquhar*, 93 Ala. 292, and authorities cited.

It is not intended, in what we have stated, to affirm that illegal testimony was received in this case. The fundamental fact on which plaintiff's right of recovery depended was D. R. Sandford's machinations, through which he deceived the Jasper Trust Company, and induced it to remit its money to the mythical R. H. Sandford & Co. Every step taken in that

chainwork was part and parcel of the fraud he so successfully designed and perpetrated. It cannot be questioned that every act done which contributed to the consummation of the particular wrong complained of in this case was material and pertinent testimony to go before the jury.

There is no error in either of the records, and each of the judgments must be affirmed.

Affirmed.

COLEMAN, J., not sitting.

McCLELLAN, J., dissenting.

Nature of Bill of Lading—Negotiability—Rights of Bona-fide Holders.—See *Leland v. His Creditors* (La.), 45 Am. & Eng. R. Cas. 301, and note 308.

Bills of Lading—Liability of Carrier to Bona-fide Holder—Negligence of Carrier in Permitting Irregular Business Methods by Shipper.—In *Walters v. Western & A. R. Co.* (U. S. Cir. Ct., N. D. Ga., Feb. 17, 1893), 56 Fed. Rep. 369, it appeared that merchants in Atlanta were engaged in business on the line of the defendant's road at a place where a station had been established for their benefit, and one of the firm appointed agent thereat; that the business of the station was really carried on in the office of the firm at Atlanta; that there never was, as to any shipment of goods, any actual transfers of bills of lading; that the bills of lading were used as collaterals by the firm for the purpose of borrowing money and otherwise; that the course of business attempted by the firm was irregular and calculated to deceive and impose on persons dealing with the firm; that these facts seemed to have been within the knowledge of the officials of the road, especially of the general freight agent, and it was held that the company was liable to innocent holders of such bills, because of its negligence in permitting transactions of that nature. *Distinguishing* *Friedlander v. Railway Co.*, 130 U. S. 416, 40 Am. & Eng. R. Cas. 70.

Negligence of Holder—Failure to Notify Carrier of Transfer—Allowing Third Parties to Control Shipments.—In *National Bank of Phoenixville v. Philadelphia & R. R. Co.*, 163 Pa. St. 467, it appeared that a bank received a bill of lading made to the order of the consignors, with an attached draft drawn on the purchasers of the goods covered by the bill of lading; that the bill contained a direction to notify such purchasers; that the purchasers thereupon drew a new draft upon one to whom they had proposed to sell their goods; that such new draft was discounted by the bank, and the proceeds placed to the purchasers' credit; that the purchasers then drew a check on this deposit for the amount of the original draft, which check they delivered to the bank, but failing to sell the goods to the person to whom the second draft was drawn, sold them to other parties, to whom they directed the railroad company to deliver the goods; that the bank never notified the railroad company that it had possession of the bill of lading, nor had the railroad company any knowledge of its existence, and the purchasers subsequently failed and did not pay the second draft, and it was held that the company was not liable to the bank for the goods, and that the action of the bank in retaining the bill of lading without notice to the company, and in permitting the purchasers to assume the position of consignors, and to direct and control the movement of the goods, was of such a negligent character as to relieve the company of its liability upon the bill of lading.

MISSOURI PACIFIC R. Co.

v.

McFADDEN.

(154 *United States*, 155.)

Liability of Carrier to Assignee of Bill of Lading Where Delivery for Transportation is Not Complete.—A carrier is not liable to the assignees of a bill of lading for cotton for the loss of such merchandise, where, at the time of the signing of the bill the cotton remains in the shipper's hands for the purpose of being compressed, for his account, and is destroyed by fire before its delivery to the carrier is consummated, although the assignees had no notice of the agreement nor of the course of dealing between the shipper and the carrier.

Error to the United States court for the northern district of Texas.

The defendants in error (plaintiffs below) sued in the circuit court of Hunt county, Tex., to recover the value of 200 bales of cotton, alleged to have been shipped from Greenville, Tex., to Liverpool, England, the shipments having been evidenced by two bills of lading, each for 100 bales of cotton. Case stated.

On application of the defendant below, the case was removed to the circuit court of the United States, for the northern district of Texas. After filing the record in that court, the pleadings were amended. The amended answer set up the following, among other, special defenses on behalf of the company:

"First. That, while it is true that it had issued certain bills of lading for said cotton, said cotton had not yet, in deed and in truth, been delivered to it. It was the habit and the custom of defendant, and well known to the plaintiffs to be such, after cottons were placed on the platforms at the compress in Greenville, before the same was compressed, it would issue bills of lading therefor to consignors desiring to ship. Said cottons would be delivered to the compress for the purpose of compressing, and that, at the time they were so delivered to it, the superintendent of the compress, or the agent of the compress, would check out such cottons intended, and the shipper would make out a bill of lading, which would be O. K.'d by the superintendent of the compress or its agent, and afterwards it would be brought to the agent of the defendant, and by him signed up, and defendant would actually receive said cotton only after it was compressed and delivered upon

its cars. This course was pursued as a matter of convenience by the compress company and the shipper, but it was not intended, by either the shipper or the defendant, that the liability of the defendant should attach until the cotton was actually delivered upon its cars. This custom was well known to the plaintiffs, George H. McFadden & Bro., and to A. Fulton & Co., and the bills of lading were made out, according to this custom, by A. Fulton & Co., as herein shown, and accepted by A. Fulton & Co., according to such custom. At the time said bills of lading were made, the cotton was in the hands of the compress, according to the custom aforesaid, and had never been delivered to defendant, the defendant's liability as a common carrier had never been attached, nor had any liability attached; but said cotton, while it was in the hands of the compress company, was wholly destroyed by fire, and never came to the hands of defendant. Defendant says said cotton was placed on said platform at said compress for the purpose of being compressed by A. Fulton & Co.; that they well knew, intended, and expected said cotton should be compressed before it was shipped. Said cotton, while at the compress, was under the control of A. Fulton & Co. or their agent, the compress company."

The answer thereupon proceeded to set out other matters, to which it is unnecessary to refer.

The plaintiff replied to the amended answer, and excepted to the first count, as follows:

"And they specially except to the first count in defendant's special answer, in so far as the same attempts to set up a custom of the manner of receiving cotton and issuing bills of lading, because the same does not show that the custom was such as is recognized and binding in law, but attempts to set up a custom which is contrary to law, and because the same does not show that it was such a custom as would relieve the defendant from liability on a contract in writing."

The reply then proceeded to except to other parts of the defendant's answer.

The court sustained the plaintiffs' exception to the first count of the amended answer, to which ruling exception was reserved. Thereupon the facts were stated to be—First, that the bills of lading had been issued to Fulton & Co.; second, that they were assigned to the plaintiffs; third, that the value of the cotton was \$8,647.83 at the time it was destroyed, and that the defendant had never paid therefor.

Upon this evidence, the case was submitted to the court without a jury, and the court found for the plaintiffs, and gave judgment for the value of the cotton. The case is brought here by writ of error.

James Hagerman, for plaintiff in error.

Geo. Wharton Pepper and *J. Bayard Henry*, for defendants in error.

Mr. Justice WHITE, after stating the case, delivered the opinion of the court.

Many questions were discussed at bar which we deem it unnecessary to notice, as we consider that the whole case depends upon the correctness of the judgment of the court below in sustaining the exception to the first defense in the amended answer. That defense averred that the cotton for which the bills of lading were issued was never delivered to the carrier; that, by a custom or course of dealing between the carrier and the shipper, it was understood by both parties that the cotton was not to be delivered at the time the bills of lading were issued, but was then in the hands of a compress company, which compress company was the agent of the shipper; and that it was the intention of the parties, at the time the bills of lading were issued, that the cotton should remain in the hands of the compress company, the agent of the shipper, for the purpose of being compressed, and that this custom was known to the plaintiffs and transferees of the bills of lading; and that, while the cotton was so in the hands of the compress company, the agent of the shipper, and before delivery to the carrier, it was destroyed by fire.

All of these allegations in the answer were, of course, admitted by the exception, and therefore the case presents the simple question of whether a carrier is liable on a bill of lading for property which, at the time of the signing of the bill, remained in the hands of the shipper Liability of carrier. for the purpose of being compressed for the shipper's account, and was destroyed by fire before the delivery to the carrier had been consummated. The elementary rule is that the liability of a common carrier depends upon the delivery to him of the goods which he is to carry. This rule is thus stated in the text-books: "The liability of a carrier begins when the goods are delivered to him or his proper servant authorized to receive them for carriage." Redf. Carr. 80. "The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods; it must rest entirely upon the one or the other; and, until it has become imposed upon the carrier by a delivery and acceptance, he cannot be held responsible for them." Hutch. Carr. 82.

This doctrine is sanctioned by a unanimous course of Eng-

lish and American decisions. *The Freeman v. Buckingham*, 18 How. 182; *The Lady Franklin*, 8 Wall. 325; *The Delaware*, 14 Wall. 579; *Pollard v. Vinton*, 105 U. S. 7; *Railway Co. v. Knight*, 122 U. S. 79, 30 Am. & Eng. R. Cas. 88; *Friedlander v. Railway Co.*, 130 U. S. 423, 40 Am. & Eng. R. Cas. 70; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 239, 49 Am. & Eng. R. Cas. 137; *Barron v. Eldredge*, 100 Mass. 455; *Moses v. Railroad Co.*, 4 Fost. (N. H.) 71; *Brind v. Dale*, 8 Car. & P. 207; *Selway v. Holloway*, 1 Ld. Raym. 46; *Buckman v. Levi*, 3 Camp. 414; *Leigh v. Smith*, 1 Car. & P. 638; *Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 331; *Coleman v. Riches*, 29 C. B. 323. Indeed, the citations might be multiplied indefinitely.

While the authorities may differ upon the point of what constitutes delivery to a carrier, the rule is nowhere questioned that when delivery has not been made to the carrier, but, on the contrary, the evidence shows that the goods remained in the possession of the shipper or his agent after the signing and passing of the bill of lading, the carrier is not liable as carrier under the bill.

Of course, then, the carrier's liability as such will not attach on issuing the bill in a case where not only is there a failure to deliver, but there is also an understanding between the parties that delivery shall not be made till a future day, and that the goods, until then, shall remain in the custody of the shipper. Does the fact that the plaintiffs claim to be assignees of the bill of lading without notice of the agreement and course of dealing between the shipper and the carrier confer upon them greater rights, as against the carrier, than those which attach under the bill of lading in the hands of the parties to whom it was originally issued, and who made the agreement?

It is to be remarked, in considering this question, that the averment of the answer, which was admitted by the exception, charged that the course of dealing between the parties, in accordance with which the goods were not delivered at the time of the issuance of the bills of lading, but remained in the hands of the compress company, which was the agent of the shipper, was known to the plaintiffs, the holders of the bills of lading. It is clear that, whatever may be the effect of custom and course of dealing upon the question of legal liability, proof of such custom and course of dealing would have been admissible, not in order to change the law, but for the purpose of charging the plaintiffs, as holders of the bills of lading, with knowledge of the relations between the parties.

That a bill of lading does not partake of the character of negotiable paper, so as to transfer to the assignees thereof

the rights of the holder of such paper, is well settled. Said this court in *Pollard v. Vinton*, *supra* :

“A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decision. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in a limited sense.

“It is an instrument of a twofold character. It is at once a receipt and a contract. In the former character it is an acknowledgement of the receipt of property on board his vessel by the owner of the vessel. In the latter, it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver. If no goods are actually received, there can be no valid contract to carry or to deliver.” See *The Lady Franklin*, 8 Wall. 325.

The rule thus stated is the elementary commercial rule. Indeed, in the case last cited this court expressed surprise that the question should be raised. These views coincide with the rulings of the English courts. The cases of *Grant v. Norway*, 10 C. B. 665, and *Hubbersty v. Ward*, 8 Exch. 330, 331, were both cases where bills-of-lading were issued and held by third parties. The rule was uniform in England until the passage of the bills-of-lading act (18 & 19 Vict. c. 111, § 3), making bills of lading in the hands of consignees or indorses for value conclusive as to shipment.

Under these elementary principles we think there was manifest error below in maintaining the exception to the first count in the amended answer. Of course, in so concluding we proceed solely upon the admission which the exception to the answer necessarily imported, and express no opinion as to what would be the rule of law if the compress company, had not been the agent of the shipper, or if the goods had been constructively delivered to the carrier through the compress company, who held them in the carrier's behalf.

The judgment is reversed, and the case remanded for further proceedings in accordance with this opinion.

Mr. Justice JACKSON, not having heard the argument, took no part in the decision of this cause.

Liability of Carriers on Bills of Lading.—See *Jasper Trust Co. v. Kansas City, Memphis & Birmingham R. Co.*, *ante* p. 153, and note 162.

Delivery of Goods to Carrier.—See *Harrell v. Burlington & Weldon R. Co. (N. Car.)*, 42 Am. & Eng. R. Cas. 417, and note 423.

SMITH

v.

SOUTHERN EXPRESS CO.

(Alabama Supreme Court, June 22, 1894.)

What Constitutes an Acceptance of Goods for Carriage "C. O. D."—Effect of Failure of Carrier to Comply with Written Request of Consignor.—Plaintiff sent to the office of defendant a package containing valuables, accompanied with a note giving the name and address of the consignee, together with the letters "C. O. D.," and figures designating a sum of money. Defendant's agent, on taking the package, gave a receipt therefor, which in nowise showed that the package was to be sent "C. O. D." *Held*, that the memorandum sent with the package was a mere offer or proposition which was not carried into the bill of lading or receipt issued by the agent, and that the omission was in legal effect a refusal or repudiation of the offer or proposition of the plaintiff.

Same—Duty of Consignor—Effect of Taking and Retaining Receipt for Goods in Ordinary Form.—If plaintiff desired to insist on the carriage of the package as a "C. O. D." package, it was necessary to have refused the receipt, and to have insisted upon the contract being so written as to carry out the intended object, but by failing to do so, and by accepting and retaining the receipt as the evidence of the contract, its terms could not be altered or varied by parol.

APPEAL from Montgomery city court.

John G. Winter, for appellant.

Tompkins & Tray, for appellee.

HEAD, J.—This was an action on the case by the appellant, Belle Smith, against the appellee, as a common carrier, to recover damages for the failure of the defendant to collect, for plaintiff's use, the sum of money specified, on delivery to the consignee, of a valuable package shipped by her, C. O. D., to a party in Little Rock, Ark.

Case stated. The plaintiff's case, substantially, is: That having in her possession, as a pledge to secure a loan of \$86.75, some valuable diamonds belonging to Miss Ada McCoy, of Little Rock, Ark., she was requested by Miss McCoy to ship the same to

her, by express, C. O. D. the sum due upon said loan. Accordingly, she sent, by her servant, an unmarked package containing the diamonds, to defendant's office, with instructions written on a small piece of paper, as follows : "Miss A. McCoy, Little Rock, Arkansas, C. O. D. \$86.75."

That the servant delivered the package to defendant's agent, at its office in Montgomery, together with the note of instructions, and received from him a receipt, signed by him for the company, showing it had received from Miss Belle Smith one package, sealed, addressed to Miss A. McCoy, Little Rock, Ark., and containing the usual contract of a freightment under which such goods are carried by the defendant.

This receipt nowhere showed that it was a C. O. D. package. On the contrary, its terms were such that, unaffected by any other fact, it was defendant's duty to deliver the package to the consignee upon the collection of the freight charges only. The servant carried this receipt to plaintiff's house, and laid it away in a washstand drawer in plaintiff's room, without showing it to plaintiff; and plaintiff never saw it until about 10 days afterwards, when she went to defendant's office and inquired for the money, and was informed by the agent that the package had not been shipped C. O. D., and had been delivered without the collection of any money, he claiming that the defendant had received no instructions to ship C. O. D.

It was admitted that the package had been delivered to Miss McCoy, at Little Rock, by the defendant, without the collection of any sum of money other than the freight charges; and it was shown that she was insolvent, and that plaintiff had, by losing the pledge, lost the means of collecting her debt.

The defendant's case was that it had received no instructions to ship C. O. D.; that it received no such note in writing as the plaintiff claimed; and further it is insisted that the receipt it executed, as matter of law, constituted the sole evidence of the contract, which could not be contradicted or varied by parol.

It was shown to be the defendant's custom, which was known to the plaintiff, when goods were shipped C. O. D., to issue a receipt like that in the present case, with the letters "C. O. D.," and figures showing the amount to be collected, written down in the left-hand corner thereof. When only freight charges were to be collected, the letter "C" was written in the same place. In the present instance the receipt had only the letter "C."

The well-known meaning of "C. O. D." was admitted to have been known to both parties at the time of the shipment.

The city court, we suppose, being of the opinion that the

receipt given by the defendant was the sole evidence of the contract, instructed the jury on written request, that if they believed the evidence they must find for the defendant, to which the plaintiff excepted. We are of opinion the ruling was correct.

It is undeniable that plaintiff was charged with notice of the contents of the receipts which the defendant's agent delivered to her servant, and that its retention without objection was an acceptance of it, on the plaintiff's part, as the evidence of the contract between the parties. The evidence shows that she knew it was not the form of receipt the company was accustomed to give for C. O. D. packages, in that it omitted the letters "C. O. D." Conceding the written memorandum was sent by the plaintiff by her servant, as contended, and that it was delivered to the agent by the servant, it was a mere offer or proposition which was not carried into the bill of lading or receipt issued by the agent, which omission was, in legal effect, a refusal or repudiation of the offer or proposition by the defendant.

If the plaintiff, then, desired to insist on the carriage of the package as a C. O. D. package, it was her duty to have refused the receipt as it was written, and insisted upon the contract being so written as to carry out that object. This she failed to do, but accepted and retained the receipt as the evidence of the contract, and its terms cannot be altered or varied by parol.

Affirmed.

"C. O. D." Shipments.—See *Pacific Express Co. v. Wallace*, *infra*, and note.

PACIFIC EXPRESS CO.

v.

WALLACE.

(*Arkansas Supreme Court*, Jan. 5, 1895.)

Right of Express Company to Limit its Liability for Goods Sent C. O. D.—An express company may limit its liability for goods shipped "C. O. D." to that of a warehouseman, while the property is in its possession for the purpose of making the collection. *Distinguishing Railway Co. v. Cravens*, 57 Ark. 112.

Liability of Company for Destruction by Mob of Goods Sent "C. O. D.," and in its Warehouse.—Where goods sent "C. O. D." are in possession of an express company under such a contract, it is not liable to the shipper because of the destruction of the goods by a mob which broke into the room where the goods were stored.

APPEAL from Crawford county circuit court.

This is a suit by appellee against appellant for the value of sundry packages of liquors stolen and destroyed, while in the possession of appellant, by a mob of unknown persons.

The cause was submitted to the judge, sitting as a jury, at the November term, 1889, of the Crawford circuit court, who, upon findings of fact and declaration of law, determined the same in favor of plaintiff in the sum of \$143.65, and defendant appealed, having duly reserved all proper exceptions. Case stated.

ABSTRACT OF TESTIMONY.

It appears that for a period of 29 days next previously to the 22d December, 1888, plaintiff from time to time shipped by defendant, an express company carrying articles on the Little Rock & Fort Smith Railroad trains, sundry jugs and packages of liquors from the town of Van Buren, his place of business, to the small station of Cabin Creek on said railroad, some 60 or 70 miles distant; that late in the night of the 24th December, after the articles mentioned had been securely locked up in defendant's storeroom in the depot at the last-named place, and after its agent had retired for the night, this room was broken into by a mob of masked and unknown persons, and said jugs and packages were all taken away or broken up and otherwise destroyed; that these packages were in defendant's possession at the time, and had been from 2 to 29 days, the earliest received having been received on the 23d day of November.

It appears, also, that as each package had been received at Cabin Creek depot, the point of destination, notice was promptly mailed to the consignee; and, further, that the consignees were constantly on the lookout for the arrival of these packages, as was also the local agent of plaintiff at Cabin Creek, who knew actually of their arrival in several instances at least, as he had the defendant's agent change the consignment, inserting other names in the place of the originals, and that none of the packages were called for or paid for, and that the express charges were not paid on any of them.

It appears from the testimony that accompanying each jug or package was a bill of the same, inclosed in an envelope with certain printed indorsements thereon designating the article shipped, and the terms and stipulations of shipment, and that, in carrying goods, the defendant's business was that of a common carrier.

It appears from the plaintiff's testimony, in addition to the foregoing, that he and his agents at Cabin Creek "knew

the terms and conditions printed upon the C. O. D. envelopes [the envelopes above referred to]; that all the packages were to be transported upon the terms, conditions, and agreements contained and printed upon the aforesaid C. O. D. envelopes, which, with bill inclosed, accompanied each jug or package": and that the value of the goods was as alleged in the complaint.

It also appears in evidence that these C. O. D. shipments meant that the goods were shipped, but not to be delivered until paid for by the consignees; that defendant was to collect and receive the price of the same for plaintiff, and make returns of the same.

The notices to consignees above referred to were on blanks filled out as follows, to wit: "—, 18—. We have received to your address, and hold at your risk, —. Express charges, \$—. Total collection, \$—. Please call for same, and present this notice, or fill out the order below. —, Agent. The Pacific Express Company will deliver to —, or bearer, who will pay all charges, and is authorized to receipt for the same. —, Consignee. Strangers must be identified."

On the C. O. D. envelopes, among other things, was the following "Notice to Shippers": "If the money to be collected from the consignee on delivery of the property described herein is not paid within thirty days from the date thereof, the shipper agrees that this company may return said property to him at the expiration of that time, subject to the conditions of its receipts for the shipment; that he will pay the charges for transportation both ways; and that the liability of this company, for such property, while in their possession, for the purpose of making such collection, shall be that of warehouseman only."

At the request of plaintiff, the court found the facts and declared the law as follows:

FINDINGS OF FACTS.

"That the defendant was an express company, and a common carrier; that it received said goods, and became liable for the safe delivery of the same to the parties to whom the same were consigned; that the liability of defendant was that of an insurer; and that this liability as an insurer did not cease until it had made a delivery of each package, in good condition, to each of the respective parties.

"That the value of the goods were as stated in plaintiff's complaint, and that the express company was not entitled to have credit for transportation of the aforesaid packages; and

that plaintiff was entitled to 6 per cent interest on each of the aforesaid packages from December 24, 1888, to this date."

DECLARATION OF LAW.

"That the defendant express company, being a common carrier, and an insurer for the safe delivery of the goods aforesaid, and that having failed to deliver the same, that it was liable to plaintiff for the amount claimed; that the plaintiff was entitled to recover from said defendant express company the amount sued for, with interest, and that the court should find for plaintiff."

To these findings and rulings of the court exceptions were duly taken and reserved.

Clayton, Brizzolara & Forrester, for appellant.

Thomas L. Wallace, pro se.

BUNN. C.J. (after stating the facts).—It is readily to be seen that the sole contention in this case is whether defendant was liable as a common carrier or as a warehouseman; and, in order to solve this question, the inquiry is, first, as to whether or not there was a special contract of shipment between plaintiff and defendant, and, if so, was that contract a lawful one, or one such as the plaintiff voluntarily made with defendant, or was it a contract imposed upon plaintiff by defendant in effect compelling plaintiff to ship on the terms of the same, not giving him the choice of shipping on the terms upon which the law compels common carriers to carry goods?

Right of company to limit liability.

A common carrier may make special contracts of carriage with customers, and thus relieve himself of many of the responsibilities imposed by the law, but he cannot contract against the consequence of his negligence; and it is held in the case of *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, that he cannot limit his liability in any respect by such special contract where the shipper is not afforded an opportunity to contract for the services required of the carrier by law without restrictions. Upon the doctrine of this case, appellee seems to rely to sustain his contention; that is to say, notwithstanding he shipped on the terms and stipulations indorsed on the envelopes (one of which was to render the liability of appellant, while the goods were waiting to be called for and paid for, that of a warehouseman only), yet that such special contract was invalid as giving him no choice as to terms of shipment. He does not say as much, but such is necessarily to be inferred.

We cannot see that the case of *Railway Co. v. Cravens*,

supra, is applicable to the facts in this case. There is nothing here to indicate that appellee did not act of his own free will in the matter; there is nothing to show that appellant sought to evade the responsibility which the law imposes upon it by driving a hard bargain with the appellee. It follows, therefore, that, at the time the goods were destroyed, they were in the possession of appellant as a warehouseman, and that his liability for the same was that of a warehouseman only, as stipulated in the implied contract of shipment between it and the appellee. Now, since appellant was only liable for a want of ordinary care in respect to its possession and preservation of the goods, and since there is neither proof nor charge of negligence in any degree against it, the findings of the court were incorrect, and consequently its declarations of law and judgment were erroneous.

The judgment is therefore reversed, and judgment will be entered here for the appellant.

"C. O. D." Shipments.—See *Cox v. Columbus & Western R. Co.* (Ala.), 49 Am. & Eng. R. Cas. 111, and note 114.

HEMATITE MINING CO.

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

(*Georgia Supreme Court, July 17, 1893.*)

Authority of Railway Agent to Receipt for Goods Received for Transportation—Receipt Issued Subsequent to Transaction as Evidence Against Company.—The general authority of a railway agent to give receipts for goods delivered for transportation extends only to such receipts as are given at the time the goods are delivered, or so near thereto as to be, according to business usage, a part of the *res gestas*. Unless special authority be shown, receipts executed by an agent several months after the transaction—more especially if litigation was then contemplated, or had become probable—are not evidence to affect the company.

Admissibility in Evidence of Information Furnished by Railway Agent as to Past Transactions.—Information furnished a witness by an agent of a railway company as to the contents of a record kept by the company is inadmissible in evidence against the company, when it appears that the information given relates to transactions long past, and it does not appear that the furnishing of such information was within the scope of the agent's employment.

Competency of Witness to Testify from Memoranda.—Although the plaintiff, while a witness on the stand, testified generally that he remem-

bered certain facts stated by him, and used certain books and memoranda to refresh his memory (the memoranda, but not the books being then before him), his evidence as to the numbers and destinations of certain cars, and the dates of their shipment, was inadmissible; it further appearing from his testimony that he could state none of these particulars without referring to the books, or to the memoranda he had taken therefrom, and that the entries in the books were sometimes written by himself, and sometimes by another in his employ; it being also apparent that at the time of testifying the witness was unable to state which entries were made by himself, and which by the other.

ERROR to Floyd county superior court.

J. F. Hillyer, for plaintiff in error.

McCutchen & Shumate and *Hoskinson & Harris*, for defendant in error.

LUMPKIN, J.—1, 2. The plaintiff sought to recover damages for an alleged failure to deliver certain car-loads of ore claimed to have been received by the railway company for transportation. If the agent of the company knew personally of the delivery of the ore he would have been a competent witness to prove the fact, and should have been introduced for this purpose. Instead of doing this, however, the plaintiff undertook to make out its case, in part, by tendering receipts for the ore executed by this agent many months after the transaction. The rejection of this evidence is one of the errors complained of. Case stated.

In our opinion, the ruling of the court below was right. To render such receipts admissible, it must affirmatively appear that they were given at the time the goods were delivered for transportation, or so near thereto as to be, according to business usage, a part of the *res gestae*; otherwise they would be the mere declarations of the agent, not made *dum fervet opus*, and therefore not binding upon the company he represented. Under such circumstances the agent of a railway company has no authority to bind it by admissions of this kind, because it is manifestly not within the scope of his authority, as agent, to make them. It would be very dangerous to receive in evidence against a principal—whether an incorporated company or otherwise—declarations of an agent, made long after the business in which the agent was acting had been transacted. Authority of agent.

Of course, the individual is bound by his own admissions deliberately made, even if they relate to a matter long past. This is so because he is supposed to have in mind at all times his own interests, and, presumably, he will admit nothing against his interests which is not the truth. The policy of the law is different with reference to agents, and they cannot be allowed to take away, either in writing or otherwise,

the rights of their principals, concerning a matter with which such agents have long since ceased to have any connection whatever. If, instead of offering written receipts, the plaintiff had offered the parol declarations of the railway company's agent, it is manifest that such sayings would have been properly excluded as mere hearsay. The fact that these declarations were reduced to writing, and signed by the agent, does not in the least change the principle. Of course, receipts obtained at the same time, not signed by the agent at all, but which the plaintiff proposed to show he intended to sign, but inadvertently omitted to do so, could not be received.

The case before us affords an apt illustration of the wisdom of the rule above stated. The receipts in question were procured from the agent after the present litigation was in actual contemplation, and for the very purpose of being used as evidence in this case. It would have been better, and more in accord with the rules of evidence, to put the agent himself on the stand as a witness, and thus allow the company an opportunity, on cross-examination, to sift the correctness of his statements, and to test the reliability of his sources of information or recollection,—a substantial right, of which the company would have been deprived if the receipts themselves had been received in evidence.

What has already been said with reference to the receipts offered is also applicable to the effort of the plaintiff to put in evidence, by introducing its own attorney as a witness, certain information which had been furnished the latter by an agent of the railway company at a point other than the alleged place of shipment, as to the contents of a record kept by the company in one of its offices at that point; it appearing that the information thus given related to transactions long past, and there being nothing to show that it was within the scope of this agent's duty or authority to furnish such information, or even that he himself kept the record in question, or had then, or had ever had, any personal knowledge of the matters concerning which he spoke.

The plaintiff in this case, though its name would indicate it was either a corporation or a partnership, really consisted of but one natural person—Linton Sparks. Having failed in every other way to make out his case, he offered himself as a witness, and undertook to testify from his own personal knowledge to the delivery of certain carloads of ore to the railway company. Although he testified, in general terms, that he remembered the numbers by which these cars were identified, their destinations, and the dates of their shipment to be as stated by him on the stand, and that.

**Admissibility
in evidence of
information
derived from
agent.**

**Competency
of witness.**

he used certain books and memoranda to refresh his memory, it is apparent he did not in fact have any definite or distinct recollection concerning the matters about which he spoke.

He admitted on cross-examination that without the memoranda "he could not remember numbers, dates, or destinations of any particular car." The books which he stated he used to refresh his memory were not before him while testifying, and he relied solely upon memoranda taken therefrom.

It further appeared from his testimony that the entries in the books were sometimes made by himself, and sometimes by another in his employ, and he was unable to state which entries had been made by himself, and which by the other. It is therefore manifest that, deprived of his memoranda, the witness would have been utterly unable to state anything definite concerning the alleged shipment of the cars, and that his professed recollection of the transaction really amounted to nothing. He was simply undertaking to swear to the correctness of information he himself had derived solely by consulting certain books, and copying extracts therefrom. Of the reliability of the books themselves there was no proof whatsoever. If the entries in the books had all been made by himself, and he had sworn to their correctness, and had stated that he had, at the time such entries were made by him, personal knowledge of the matters in question, his testimony would have been admissible.

It appearing from his own testimony, however, that some of these entries were made by another person, and he not undertaking to distinguish those entries from others made by himself, or to state that he had ever had any personal knowledge of the matters to which they related, his testimony can only be characterized as being, to a greater or less extent, mere hearsay, and utterly unreliable. No reason appears why the books themselves, together with the proper proof of their correctness, were not produced. Had this been done the witness might at least have verified the correctness of his statements based on entries made by himself, and thus have given some force to the assertion that his memory had thereby been refreshed.

We think that his testimony, in the manner in which it was presented, was clearly inadmissible, and that the court properly rejected the same.

The plaintiff having entirely failed to make out a case against the railway company, a nonsuit followed, as a matter of course.

Judgment affirmed.

Authority of Railway Station Agents.—See *Easton v. Dudley* (Tex.), 45 Am. & Eng. R. Cas. 340, and note 344.

61 A. & E. R. Cas.—12

McCARTY *et al.*

v.

LOUISVILLE & NASHVILLE R. Co.

(Alabama Supreme Court, December 22, 1898.)

Exemption of Carrier from Liability because of Fault of Shipper—Necessity of Negating Contributing Fault.—Where a carrier seeks to bring itself within the exceptions to the common-law rule of liability because of the fault of the shipper, it must bring itself entirely and utterly within it by negating all contributing fault of its own.

Effect of Negligence of Shipper in Packing Goods and Negligent Transportation of Goods by Carrier.—Where a shipper is guilty of negligence in packing goods for transportation, and the carrier is likewise guilty of negligence, without which, notwithstanding the shipper's fault the injury to the goods would not have happened, the fault of the latter neutralizes the negligence of the former, and destroys it as a ground of defense to the carrier.

Same—Action Against Carrier—Effect of Failure of Carrier to Show Its Freedom from Negligence.—Where the evidence tends to show that the goods, for the injury to which the action was brought, were improperly and negligently packed or loaded by the consignor, and thus affords an inference, or room for inference, that but for the consignor's fault the injury would not have occurred, in the absence of evidence on the part of the carrier, to show freedom from negligence on its part, the jury may indulge in the presumption that the carrier was also negligent in and about the transportation and delivery of the goods, and that this negligence and the shipper's negligence contributed to the result complained of.

Liability of Carrier for Loss Resulting from Negligence of Shipper Co-operating with "Act of God."—An instruction is unsound which is open to a reasonable construction that a carrier would be liable for loss or injury to goods received by it for transportation if the negligence of the shipper co-operated with an act of God or of the public enemy.

Imputing Fault of Consignor in Loading, to Consignee.—The fault of a consignor in improperly loading goods for transportation is imputable to the consignee.

Liability of Carrier—Apparent Improper Loading—Negligence of Carrier.—If the improper loading was apparent to the carrier's servants by ordinary observation, or if it was not apparent but the carrier was guilty of negligence but for which the injury would not have happened, it would be liable notwithstanding the negligence of the shipper.

Duty of Connecting Carrier to Inspect Condition of Goods in Closed Car.—If goods are improperly loaded in closed cars, there is no duty on a connecting carrier to open the cars and inspect their contents where the goods are not of a character to require such attention.

APPEAL from Jefferson county circuit court.

Upon the introduction of all the evidence the plaintiffs requested the court to give the following written charges, and separately excepted to the court's refusal to give each of them as asked :

"(1) The court instructs the jury that if they believe the evidence they shall find for the plaintiffs, and assess such damages as the plaintiffs have suffered from the failure to deliver the goods. Case stated

"(2) The court instructs the jury that if they believe the evidence they must find for the plaintiffs in this case, unless they find from the evidence that the terra-cotta was improperly loaded upon the cars, and that the terra-cotta was broken solely on account of the improper loading, and that the defendant was not guilty of negligence in handling and hauling the terra-cotta.

"(3) The court instructs the jury that if they believe from the evidence that the four car-loads of terra-cotta were delivered to the defendant as a common carrier for transportation to Birmingham, Alabama, and that the said goods were delivered to plaintiffs by the defendant, or by any one for him, in a damaged or broken condition, then the burden of proof is on the defendant to show affirmatively that it was not guilty of negligence in breaking and injuring said terra-cotta."

The court, at the request of the defendant, gave the following written charges, and to the giving of each of said charges the plaintiffs separately excepted :

"(1) If the jury believe from the evidence that loading the terra-cotta without straw or sawdust was a negligent and improper loading, and that it contributed proximately to the breakage of the terra-cotta, then they must find for the defendant, if the jury believe further from the evidence that the terra-cotta was loaded without straw or sawdust.

"(2) If the jury believe from the evidence that there was an open space on one or more of the cars, up to which on each side the terra-cotta was piled, and the sides of such open space were not boarded up or braced, and that it was improper loading not to board up or brace the terra-cotta, and that the want of boards or braces contributed proximately to the injury, then the jury must find for the defendant.

"(3) The inquiry as to whether or not the plaintiff had notice of the arrival of the cars is not material under the evidence in this case.

"(4) There is no evidence that the defendant has concealed or suppressed any testimony material to this case.

"(5) The failure to notify plaintiffs of the arrival of the cars of terra-cotta, if the jury believe there was such failure

under the evidence in this case, was not the proximate cause of the damage."

James A. Mitchell, for appellants.

Hewitt, Walker & Porter, for appellee.

McCLELLAN, J.—Appellants are plaintiffs and appellee is the defendant in this action. The complaint contains four counts. It is conceded by counsel on either hand that the third count presents the case relied on by plaintiffs, and that upon that count alone the trial was had.

The case made thereby is the following: In October, 1890, the Pioneer Fireproof Construction Company delivered to the Chicago, Burlington & Quincy Railroad Company at Ottawa, Ill., four car-loads of terra-cotta for carriage, and consigned to plaintiffs at Birmingham, Ala. The defendant was also a common carrier operating a connecting line of railway on the route from Ottawa to Birmingham, and as such received the consignment from the initial carrier, "and undertook to deliver the same to plaintiffs at Birmingham for a reward."

This undertaking was not performed, the complaint avers, but, to the contrary, the defendant "did not deliver all of said goods to them [the plaintiffs] and did not deliver said goods to the plaintiffs in good or proper condition, or in the condition they were in when shipped and consigned to plaintiffs, but that said goods when delivered were badly broken and injured, and a large part thereof rendered wholly unfit for use." The damage to the goods is laid at \$400, which the complaint seeks to recover.

It is manifest that the case made by the averment of these facts tendered no issue of negligence *vel non* on the part of the defendant. The contract averred is an unconditional

Liability of carrier. common-law contract of carriage without reservations or exceptions. By its terms the defendant insured the safe delivery of the goods to the consignee, and assumed liability for any loss or injury resulting from any cause except such as afforded the carrier a defense at common law. The strictest proof of all possible care on the part of the carrier in the transportation and delivery of the goods would have been no defense, and, of course, proof of the carrier's negligence was in no wise essential to a recovery. The defenses which a carrier under such a contract may interpose to an action for failure to deliver in good condition are commonly mentioned as two only, namely, that the loss or injury was due either to the act of God, or to the act of a public enemy.

But there is in reality a third, resting on the fault of the

owner of the goods or his agent. This latter defense, while the fault involved in it may consist merely of negligence imputable to the plaintiffs, is in no sense, and bears little analogy to, the defense of contributory negligence available in actions against common carriers of passengers, sometimes in actions against carriers of live stock, and even, it may be, in actions against carriers of goods—inanimate things—under contracts of affreightment which limit liability to loss or injury occasioned by the carrier's negligence. Nowhere in the books can any reference be found to the defense of contributory negligence against the common-law liability of common carriers of goods; and, in the nature of things, there can be no such defense, to speak with any approach to legal accuracy. There must always be negligence on the part of a defendant, or else it cannot be said that a plaintiff has been guilty of contributory negligence; or, in other words, "there can be no contributory negligence on the part of a plaintiff except in cases where there has been negligence on the part of the defendant. Contributory negligence exists only when the negligence of both parties has combined and concurred in producing the injury." 4 Amer. & Eng. Enc. Law, p. 18.

Negligence of shipper—Contributory negligence.

This is illustrated in numerous cases decided by this court where damages were claimed for the results of wantonness and the like, and pleas of contributory negligence were held bad; and it is illustrated in the case at bar, where the gravamen of the action is a failure to deliver goods, without reference to the inquiry whether the failure was due to defendant's negligence. To allow a plea of contributory negligence to such action would be to allow the defendant to change the case made by the complaint by confessing a fact which is not averred in it, and which is not necessary to the plaintiffs' recovery, and then to escape on proof of a fact which is a defense only against the case he has thus made for the plaintiffs. There is no room in this case for the plea of contributory negligence.

The special pleas 6, 7, and 8, filed by the defendant, were pleas of this character. They charge that plaintiffs themselves were guilty of negligence, in that they or their agents improperly and negligently loaded the terra-cotta on the cars in which it was to be and was carried from Ottawa to Birmingham, and that such improper loading proximately contributed to the alleged injury complained of. This was to say that the defendant was guilty of negligence, but that it ought not to be held liable for the consequences thereof, because its negligence was aided to the damnifying result

Effect of plea of contributory negligence.

—was contributed to—by the concurring negligence of the plaintiffs. These averments, in short, were admissions of negligence on the part of the pleader, coupled with charges of negligence on the part of the plaintiffs.

The further averments of these pleas that the cars were closed when they were received by the defendant from the first carrier, so that the condition of their contents was not visible, and that defendant and its agents did not

Pleading freedom of carrier from negligence.

then know that said cars were improperly loaded, if intended to negative all negligence on the part of the defendant, are repugnant to and inconsistent

with the admission of defendant's negligence, implied in the allegation that plaintiff's negligence contributed to the injury. On the other hand, if these further averments are not to be taken as negating all negligence imputable to defendant,—and that is probably the true construction of them,—the pleas are yet bad, for, as a carrier is liable for loss or injury resulting from the act of God aided by his own negligence, or from the act of a public enemy to which his own fault contributed, so he is liable for any loss or injury which is due to the concurring and contributory negligence of himself and the shipper; and as, when he pleads the act of God or of the public enemy, he must bring himself within these exceptions to the common-law rule of liability by averring his own want of concurring negligence, so, when he relies upon the other exception to that rule of liability,—that which rests upon the fault of the shipper,—he must bring himself entirely and perfectly within it by negating all contributing fault of his own. *Lawson, Carr.* pp. 177, 178; *Steele v. Townsend*, 37 Ala. 247; *Grey v. Trade Co.*, 55 Ala. 387; *Railroad Co. v. Henlein*, 52 Ala. 606; *Railroad Co. v. Touart*, 97 Ala. 514, 55 Am. & Eng. R. Cas. 300; *Ang. Carr.* § 202; *Hutch. Carr.* § 766.

The rule governing this class of cases cannot be more perspicuously stated, perhaps, than by comparing it with and differentiating it from the doctrine which obtains in respect of

Effect of mutual negligence.

causes of action resting primarily on defendant's negligence in the carriage of persons. In these latter cases the contributory negligence of the plaintiff neutralizes and renders innocuous the casual negligence of the defendant, and destroys a cause of action resting upon it. But in the other class of cases—that to which the case at bar belongs—negligence upon either hand is regarded from an entirely different standpoint, and accorded an entirely different and contrary effect and operation, so to speak, on the rights of the parties. The unaided, uncontributed-to negligence of the plaintiff producing the in-

jury is a defense; but where there is negligence also on the part of the defendant, without which, notwithstanding plaintiff's fault, the injury would not have happened, this fault of the defendant neutralizes and eviscerates the negligence of the plaintiff as a ground of defense. In the one case, plaintiff's contributory negligence destroys the cause of action; in the other, defendant's concurring negligence destroys the defense.

The evidence tended to show that the goods for injury to which this action is prosecuted were improperly and negligently packed or loaded by the consignor who sold the goods to plaintiffs, and it afforded an inference, or, rather room for an inference, that but for this fault of the seller and consignor the injury would not have occurred. But, though the jury had found in line with this tendency of the evidence, and deduced the conclusion therefrom, that plaintiffs, or those for whose acts or omissions in the premises plaintiffs were responsible, were at fault, and that such fault had a casual connection with the injury, it was yet their duty to indulge the presumption that the defendant was also negligent in and about the transportation and delivery of the goods, and that this negligence aided plaintiff's negligence to the result complained of, there being no evidence whatever on the part of the defendant, upon whom the burden in this regard rested, nor, indeed, any averment, to the contrary.

It follows, on this state of the case, the evidence without conflict showing the injury, and the defendant having failed both in averment and proof to bring itself within the exception under which it in some measure attempted to shield itself from liability, that the jury should have been instructed, as requested in writing, to find for the plaintiffs if they believed the evidence. Upon the same considerations, charge 3 requested by plaintiffs should have been given, charges 1 and 2 given for the defendant should have been refused, and defendant's pleas numbered 6, 7, and 8 should have been held bad.

Charge 2 of plaintiffs' series is abstractly unsound, in that it is open to a reasonable construction, whereby its effect would be to hold carriers liable when the loss or injury results from the fault of the shipper co-operating with the act of God or the public enemy. It is not essential to exemption from liability that the damages claimed should have resulted solely from any one of the exceptional causes. If two or all of such causes combine to produce the injury, and the carrier is without fault, he, of course, is not liable.

Province of
jury.

Erroneous in-
struction re-
quested.

The only other error we find in the record lies in the exclusion of the testimony of the witness Slater to the effect that these cars were "well and carefully loaded." This was the mere opinion of the witness, it is quite true, **Imputing fault of consignor.** but we think a sufficient predicate had been laid to render his opinion on that subject competent evidence. If the consignor was at fault in the loading of the consignment, the plaintiffs, in our opinion, would be responsible therefor. The fault is imputed to them, the consignor having undertaken to properly load the goods for transportation to them.

If the improper loading was apparent,—that is, was a fact which addressed itself to the ordinary observation of the carrier's servants,—or if it was not apparent, but the carrier was yet guilty of negligence but for which the injury **Apparent improper loading.** would not have happened, the carrier would be liable, notwithstanding the negligence of, or imputable to, the plaintiffs. If the cars used in this transportation were close cars, and came to the defendant with their doors closed, so that without opening the doors the condition of their contents could not be seen, we should say the improper loading, if they were, indeed, improperly loaded, was not apparent within the meaning of the rule we have stated.

In such case there would be, we think, no duty on the connecting carrier to open the cars and inspect their contents, which were not of a character to require such attention, assuming proper loading in the first instance. **Duty of connecting carrier to inspect goods in closed cars.** Whether these cars were open or close cars, and, if the latter, whether they were in fact closed when they came to the defendant's road, and while being transported over it, was not made to appear in the evidence adduced on the trial.

What we have said will, it is thought, be sufficient for the guidance of the lower court on another trial.

Reversed and remanded.

Presumption as to Condition of Goods When Shipped.—See *Mobile & Ohio R. Co. v. Tupelo Furniture Manufacturing Co.* (Miss.), 42 Am. & Eng. R. Cas. 497, and note 498.

E. O. STANARD MILLING CO.

v.

WHITE LINE CENTRAL TRANSIT CO.

(122 *Missouri*. 258.)

Extent to which Carrier may Limit its Liability.—The liability of a common carrier may be limited or modified by express contract, but the carrier cannot stipulate against loss or damage occasioned by its negligence.

Construction of Contract of Carriage—Consideration.—If there is a reasonable doubt as to the consideration of a contract of carriage, it is to be construed strictly, and most strongly against the carrier.

Same—Exemption by Carrier of Liability for Loss by Fire while at Depots.—By a bill of lading a carrier agreed to forward goods shipped with as reasonable despatch as its general business would permit, "damages incident to railroad transportation, loss or damage by fire or the elements while at depots, excepted." *Held*, that the words "while at depots" only referred to the depots at which cars containing the goods shipped might be stopped while *en route* to their destination, and not to a depot at the end of the route.

Effect of Placing Bills of Lading in Evidence—Right to Read Bills to Jury—Limitation of Effect.—If bills of lading are admissible in evidence for any purpose, there is no error in permitting them to be read to the jury; and if their effect ought to be limited, an instruction should be requested for such limitation by the court.

Nature of Carrier's Liability After Storage of Goods at Destination—Degree of Care Required.—Where goods have been removed from the cars at their destination and stored, the carrier occupies the relation of warehouseman to the shipper, and is only answerable for loss occasioned for the want of ordinary care and skill.

Same—Test of Gross Negligence of Carrier as Warehouseman.—The question of the gross negligence of the carrier after the goods have been stored is whether it took the same care of the shipper's property as it did of its own.

Action Against Carrier for Negligent Loss of Goods—Burden of Proof.—Where a recovery is sought against a carrier for the loss of goods delivered to it for transportation because of its alleged negligence, the burden of proving such negligence is on the plaintiff.

Same—Admissibility of Proof of Negligence.—In an action against a carrier to recover the value of goods delivered for transportation, and which were destroyed by fire in a warehouse owned and managed by it at the place of destination, if the complaint charges that the defendant's negligence consisted in failing and neglecting to exercise reasonable care while the property was so stored, evidence that the alleged negligence consisted in storing the property in a warehouse, unsafe because of its proximity to a lard refinery is inadmissible.

Review of Order Awarding New Trial.—On appeal from an order granting a new trial, the court will only review the grounds set forth in the order sustaining the motion, and the grounds of the motion; and if the new trial was properly granted upon any of the grounds assigned therefor, the order granting the same will be affirmed.

Right of Trial Court to Grant New Trial on Grounds Other than Those Assigned.—The trial court may grant a new trial for causes other than those assigned in the motion for such new trial.

APPEAL from St Louis circuit court.

E. W. Pattison, for appellant.

Campbell & Ryan, for respondent.

BURGESS, J.—This is an action against the defendant on its common-law liability as a common carrier. The petition alleges that defendant “is a common carrier for goods for hire, and as such received from plaintiff certain flour to be carried to New York, and there delivered to plaintiff.” It also avers that defendant carried the flour to New York, but did not deliver it to plaintiff, but stored it; that it reached its destination on the 27th, 28th, and 30th days of March, 1889, and was, on the 19th of April, 1889, while in defendant’s possession, by reason of the failure of defendant to exercise reasonable and ordinary care of the flour while so stored, destroyed and lost to plaintiff. The value of the flour at the time of its destruction is alleged to be \$2542.50.

Defendant, in its answer, admits the receipt and transportation of the flour; that it arrived at defendant’s terminal depot in New York as alleged, and at the times mentioned in plaintiff’s petition; but avers that it was transported under a special contract. It then, by way of defence, alleges that the contract exempted it from liability for loss or damage by fire while at depots; that on the next business day after the arrival of each shipment defendant gave plaintiff notice of such arrival, and that the flour was ready for delivery to plaintiff’s order, and notified it that, if the flour was not removed within 24 hours, it would be stored at plaintiff’s risk; that plaintiff did not remove the flour, nor order it delivered within the 24 hours; that thereupon defendant stored the flour, and held it without charge to plaintiff until it was destroyed by fire. The answer then denies all allegations of negligence, and then sets up by way of counterclaim its demand for freight on the flour, amounting to \$261, which it avers plaintiff has never paid.

Plaintiff, by way of reply, denied all allegations in the answer.

The evidence showed the following state of facts: That the flour arrived at the Sixteenth-street station of the New York Central & Hudson River Railroad Company, which was defendant’s terminal depot in New York, on the respective days mentioned in the petition; that from and after its arrival defendant was ready to deliver it, lighterage free, at any point where plaintiff might order it delivered, on either side of the

Hudson river or of the East river, or at Staten Island ; that within 24 hours after the arrival of the flour plaintiff was notified of its arrival, that it was ready for delivery, and that, unless an order were given for delivery within 24 hours thereafter, it would be stored at the risk of the owner, and defendant would no longer be liable as carrier ; that by the custom prevailing in New York goods coming over the railroad lines consigned to persons in that city were permitted by the companies to remain at their depots, without charge to the consignees, until the latter should order them delivered ; that plaintiff gave no order for the delivery of this flour until after its destruction by fire on April 19th, though it was held by defendant awaiting such order from 20 to 22 days ; and that no payment or tender of the charges for transportation was ever made.

The flour was all stored in the freight-house on Pier D. This pier was entirely destroyed by the fire, as well as all but a small portion of its contents. Such portion of its contents as were removed were taken from the eastern or entrance end, where a space of about 40 feet was cleared, mostly on the north side. The freight-house on this pier was a two-story building. The upper floor contained nothing but flour,—a hundred car-loads, or more,—and here two-thirds of plaintiff's flour was stored. The remaining third was stored on the lower floor, on the south side, and 300 feet from the eastern or entrance end of the building. The contents of the building when it burned were 203 car-loads of freight. A large proportion of this was flour, of which there were 21,215 barrels and 1151 sacks, or between 120 and 130 car-loads. Two of plaintiff's witnesses—Haskell and Briggs—testified that it would have taken, under the most favorable circumstances, two days to remove the contents of this building. That it would have taken a whole day to clear the lower floor, and to do that it would have required extraordinary facilities.

Between Fifty-ninth and Sixtieth streets there stood a double four-story brick building, owned by the N. W. C. R. R. Co., and divided by a three-foot party wall, the south half being occupied by the Rossiter Storage Company, the north half by the Wilcox Lard Company, a lessee of the railroad company, and an occupant of the building for seven or eight years prior to the fire. That this portion of the building was filled with fatty substances, the upper story containing tanks filled with oil, the floor being saturated therewith ; and that the fire had broken out in an upper story of this building about February, 1888. The fire commenced between 3 and 4 o'clock in the afternoon, in the southern, or Wilcox half, of this building, which was usually called, as a whole, the "Rossiter Building." The railroad company had no control of this

building, or any part of it. While the fire was burning in the southern half of this building, it communicated to the shed situated on the pier at the foot of Fifty-ninth street, and consumed it, with its contents. After that the fire broke out in the northern half of the Rossiter building. From the Rossiter building it communicated to Elevator A, from that to Elevator B, and from B to Pier D, where the fire was stayed. The duration of the fire seems to have been between five and six hours. The various witnesses whose testimony was introduced by plaintiff vary somewhat in their estimates, as they do also as to the time at which the successive buildings took fire, and the length of the intervals between the ignition of the successive buildings. It seems to have been from four to four and a half hours after the first alarm that Pier D took fire.

When the fire was first discovered it was not anticipated that it would extend as far north as Pier D. The officers of the fire department assured the officers of the railroad company that they would save the pier, and that they would have no need of moving the freight; that they would only be in the way, and, if left alone, they would save the pier. The fire-chief expected at first to confine the fire to the building in which it had its origin. While Elevator A was on fire, and after Elevator B had caught, which was about three hours after the fire was first discovered, they expressed the conviction that there was no danger to the pier. Sparks and cinders, however, from the burning building were falling all over the yard. The danger from this source was met by defendant—first by placing men with water and with brooms on the roofs of all the freight-houses, and by running hose so as to play on the elevators and other buildings; secondly, by running the cars, which were standing in the southern part of the yard, near the fire, up northwardly out of danger.

While Elevator B was burning, and after Pier D was threatened, as much freight as possible was removed. The company put all of its own men, and as many men as it could hire from the crowd of bystanders, at work rolling out bales, boxes, barrels, and other freight. They worked about an hour, but did not succeed in clearing more than 40 feet of the north side of the eastern end. While the evidence showed that plaintiff's property was all consumed by the fire, it also showed that defendant did save a part of its own property. But it did not show that defendant's servants or agents neglected property in its care in order to save the property of the company, or that any more care was exercised to save its own property than to save that which was in its keeping belonging to others.

At the close of plaintiff's evidence defendant asked the court to give the following instructions in the nature of a demurrer to the evidence :

“Upon the pleadings and the evidence offered by plaintiff the jury are instructed that the plaintiff is not entitled to recover.”

The instruction was refused, and defendant duly excepted at the time.

The only instruction as to which any question is raised in this court is No. 1 given at the instance of the plaintiff, and 5, 6, and 7 for defendant. Instruction No. 1 given at the instance of the plaintiff is as follows :

“1. The court instructs the jury that, though they may find from the evidence that the origin of the fire which destroyed the flour was accidental, yet, if they believe from the evidence that the flour might have been saved by reasonable efforts by defendant or its employés, then the defendant is liable for the loss ; and the jury are instructed that the degree of effort, care, and foresight required of defendant was such as might reasonably be expected of persons of ordinary common sense and prudence, engaged in like business and under the exigencies of the situation, as shown by the evidence.”

The remaining three were given at the instance of defendant, and are as follows :

“5. The jury are instructed that the defendant was bound only to exercise such care with reference to all the property in its charge as a man of ordinary prudence would have exercised under all the circumstances of the case as shown by the evidence, and it was not bound to exercise any more care to save the property of plaintiff than to save the property of other persons in its charge or its own property. And if the jury believe from the evidence that defendant did exercise proper care, as above explained the verdict must be for the defendant.

“6. The jury are instructed that the defendant was not bound to single out plaintiff's flour, and save it before all others. The most that could be required of defendant was that it should use such diligence and make such efforts to save the property generally in its care as would under all the circumstances, be reasonable. If, with such efforts and diligence, it could save only a part of the property in its care, plaintiff has no right to complain because its property was not a part of that saved.

“7. It is not for the defendant to prove that it did exercise due care, but for plaintiff to prove that it did not ; that is, the burden of establishing that defendant did not exercise proper care, as explained in the previous instructions, rests upon the plaintiff.” Instruction numbered 8 was asked by plaintiff, and refused, and reads as follows :

“8. The court instructs the jury that after the arrival of the flour in New York, and while in its warehouse, the de-

defendant was under obligation to keep the flour in a reasonably safe place; and if you believe from the evidence, in view of all the circumstances in evidence, that the railroad company did not keep it in a reasonably safe place, and as a result thereof the flour was destroyed, then you will find a verdict for the plaintiff."

Under the evidence and instructions of the court, the jury found a verdict against plaintiff for damages, and for defendant against it for the full amount of the counterclaim, \$268.83. Plaintiff in due time filed its motion for a new trial, alleging the following grounds therefor:

"*First.* The action of the court in overruling plaintiff's request to the permitted to read the cross-examination of witnesses Haskell and Briggs.

"*Second.* The fact that defendant was allowed, on cross-examination of E. O. Standard, to bring out before the jury incompetent, irrelevant, and immaterial evidence.

"*Third.* That the court admitted incompetent, irrelevant, and immaterial evidence offered by the defendant.

"*Fourth.* That the court erroneously sustained defendant's objections to proper and competent evidence offered by the plaintiff.

"*Fifth.* That improper instructions were given by the court, and proper instructions refused.

"*Sixth.* That the verdict of the jury was against the law and the evidence, and the weight of the evidence.

The motion was sustained, and the judgment on the verdict was set aside, on two grounds: First, that the bills of lading were improperly admitted in evidence; and, second, that the instruction numbered 5 was erroneous,—to which action of the court defendant duly excepted, and in due time perfected its appeal.

This being an appeal from an order of the court granting a new trial, nothing can be considered by this court save and except the grounds set forth in the order of the court for

Review of
order award-
ing new trial. sustaining the motion as appears from the record, and the grounds set forth in the motion itself. As the evidence was in favor of the appealing party, he is not in a position to complain of any adverse

ruling of the court prior thereto, and only such matters as occurred during the trial will be passed upon as are necessarily involved in the consideration of the questions raised in the motion for a new trial, and in the order of the court granting it; and if for any one or more of the causes thus assigned the new trial was properly granted, the judgment must be affirmed; otherwise, reversed.

That the court had the inherent power to set aside the

verdict and grant a new trial for the causes assigned in the order, independent of the motion for a new trial, is now well settled law. Hewitt v. Steele, 118 Mo. 463; Lovell v. Davis, 52 Mo. App. 342, and authorities cited.

The first ground upon which the order granting the new trial was sustained, as appears from the record, was that the court erred in admitting illegal evidence on the part of the defendant. This is also plaintiff's third assignment in the motion to set aside the verdict. This action of the court was predicated upon its ruling in admitting in evidence over the objection of plaintiff the bills of lading offered by defendant. One of them is here given in full, the two being exactly alike as to the number of barrels carried. It is as follows:

INDIANAPOLIS & ST. LOUIS RAILWAY CO.	
FAST FREIGHT LINE.	
GENERAL FREIGHT OFFICE, CHAMBER OF COMMERCE, ST. LOUIS, MO.	
White Line	
Route	
	East St. Louis, 3-19, 1889.
<u>Marks.</u>	RECEIVED from E. O. STANDARD MILLING COMPANY the following property, in apparent good order, except as noted, which they agree to forward with as reasonable dispatch as their general business will permit to _____ Station, and there deliver unto consignee, or next common carrier, if destined to a point beyond the line of this Company's road, upon payment of freight and charges, the dangers incident to railroad transportation, loss or damage by fire or the elements, while at depots, excepted; and the further exception of the dangers of lake, rivers, and canal navigation if forwarded <i>via</i> lake, river, or canal. (Original).
ROYAL PATENT	
Do.	150 BARRELS FLOUR, W. L. 1248.
	150 BARRELS FLOUR, W. L. 8605.
CONTRACT RATES FROM EAST ST. LOUIS TO NEW YORK,PER 100 LBS. 58c. PER BARREL.	E. O. STANDARD MILLING Co., NEW YORK,
WEIGHTS AND CLASSIFICATIONS SUBJECT TO CORRECTIONS.	LIGHTERAGE FREE N. Y.
	(Signed) M. P. KELLEY, AGENT. S.

Defendant's first contention is that the bills of lading were admissible in evidence for all purposes, and when thus admitted they showed that by their terms it was exempted from loss or damage by fire while at depots, and that, as the loss was occasioned by fire after the arrival of the flour at the depot in New York, by the terms of the contracts it was relieved from any liability as common carrier.

That the liability of a common carrier may be limited or modified by express contract seems clear. *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 382; *Moses v. Railroad Co.*, 24 N. H. 90. But it is equally clear that

Limitation of liability. losses or damages occasioned by negligence cannot be stipulated against; and if there be a reasonable doubt as to the construction of the contract, that it is to be construed strictly and most strongly against the carrier. As was said in *Barter v. Wheeler*, 49 N. H. 31: "We think, also, to justify the finding of the discharge of a common-law liability by the assent or agreement of the consignor, and especially by means of a bill of lading, which is the act of the carrier alone, the terms ought to be explicit and unequivocal, and doubtful expressions ought to be taken most strongly against the carrier; and such we think has been the general doctrine, both in English and American courts." 2 Redf. R. R. (6th Ed.), p. 123, § 17; *Nicholas v. Railroad Co.*, 89 N. Y. 370, 9 Am. & Eng. R. Cas. 103; *Holsapple v. Railroad Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487; *Elliott v. Railroad Co.* (Super. Buff.), 11 N. Y. Supp. 691.

The bills of lading provide that the defendant company

Construction of bill of lading. "agree to forward with as reasonable dispatch as their general business will permit to — station, and there deliver unto consignee, or next common carrier if destined to a point beyond the line of this company's road, upon payment of freight and charges; the damages incident to railroad transportation, loss or damage by fire or the elements, while at depots, excepted."

It is by no means clear that the depots excepted included the depot at the point to which the flour was to be shipped, and especially when taken in connection with the words, "damages incident to railroad transportation," which seem to have reference to damages incurred while in transit. Construing the bills by the rule announced in the foregoing authorities, we must hold that the words "while at depots" only refer to the depots at which the cars containing the flour might be stopped while *en route* to New York.

If, however, the bills of lading were admissible in evidence for any purpose, there was no error committed in permitting

them to be read in evidence to the jury. They were, we think, admissible in evidence in support of defendant's counterclaim. In fact they were the best evidence at defendant's command, as they showed the rate of freight to be paid defendant for the transportation of the flour. Defendant had the right to introduce all the legitimate evidence that it saw proper and that its counsel thought necessary in support of its counterclaim, and this even though it may have theretofore introduced other evidence in regard to the same matter; and, if plaintiff thought the effect of the freight bills ought to have been limited, the court would have given an instruction so limiting them, if he had been asked to do so. *Garesche v. St. Vincent's College*, 76 Mo. 332; *Wright v. Gillespie*, 43 Mo. App. 244.

Effect of admission of bill of lading in evidence.

Another cause assigned by the court for setting aside the verdict was that it committed error in giving the fifth instruction at the request of defendant. This instruction is criticised because it is argued that it is liable to the construction that defendant was under no more obligation to try to save the plaintiff's property in its care than it was to save its own property. It told the jury that defendant "was not bound to exercise any more care to save the property of other persons in its charge than of its own property."

Degree of care required of carrier in its relation of warehouseman.

It was admitted by the stipulation filed that goods coming into New York over the lines of the various railroads terminating at said city, and consigned lighterage free to persons doing business in said city, as in this case, were permitted to remain, without charge to consignees, at the depot and stations of said railroad company in said city, until ordered by the respective consignees to be delivered to the railroad company, or until ordered by the company to remove it. The liability of the defendant as a common carrier ceased, after the arrival of the flour at its destination, and its discharge from the cars. Thus it was held in *Holtzclaw v. Duff*, 27 Mo. 395: "After the hemp [shipped over the H. & St. J. R. R.] reached the terminus of the road, and was removed from the cars, a different and less onerous obligation was assumed, and they became liable as warehousemen and forwarding agents, and as such were only bound to take reasonable care of the property, and were only answerable for losses occasioned by their fault or negligence." This is the rule announced in *Gashweiler v. Railway Co.*, 83 Mo. 112, 25 Am. & Eng. R. Cas. 403, in which the *Holtzclaw Case* is cited with approval. See also *Cramer v. Express Co.*, 56 Mo. 528; Ang. Carr. (2d Ed.), § 302, 304.

When the flour was removed from the cars and stored, defendant occupied the relation towards plaintiff of warehouseman, and was only answerable for loss occasioned by the want of ordinary care and skill. *Gashweiler v. Railway Co.*, *supra*. The want of ordinary care is said to be gross negligence. *McCan v. Rutherford*, 84 Mo. 84; *Gray v. Packet Co.*, 64 Mo. 47. Under the gratuitous bailment existing, the defendant was only liable for gross negligence, the true test of which is whether the defendant took the same care of plaintiff's property as it did of its own. *Whitney v. Bank*, 55 Vt. 154. This is the measure of defendant's duty as presented by this construction, which seems to us to in effect say that defendant was not bound to exercise any greater degree of care to save the property of plaintiff in its custody than a person of ordinary care and prudence might reasonably be expected, under similar circumstances, to take care of and save his own property. There was no error in giving the instruction.

Another cause urged why the court might and should have set aside the verdict and granted plaintiff a new trial is that it committed error in giving instruction No. 7 at the request of defendant, which imposed upon plaintiff the burden of proving defendant did not exercise proper care. Sherman & Redfield, in their work on Negligence (4th Ed. § 57), state the rule as follows: "The burden of proof in an action for negligence rests upon the plaintiff. * * * It is certainly the duty of plaintiff to prove affirmatively that the defendant had been negligent. It is not enough for him to prove that he has suffered damage by reason of some act or omission of the defendant. He must prove that the defendant, in such act or omission, violated a legal duty incumbent upon him." In case where a bailee has neglected to deliver property to the bailor on demand, and no allegation is made by the plaintiff in an action as for a conversion of the property that it has been lost or destroyed by reason of the negligence of the defendant, the burden of proof rests on the defendant to account for the property. *Goodfellow v. Meegan*, 32 Mo. 280; *Wiser v. Chesley*, 53 Mo. 547. But if the plaintiff alleges in his petition what has become of the property, and avers that it was lost or destroyed through negligence or carelessness on the part of the bailee, the burden of proof rests upon him.

In *Read v. Railroad Co.*, 60 Mo. 199, which was an action against a carrier whose bill of lading exempted it from loss by freezing, the court says: "When the loss of the goods is established, the burden of proof devolves upon the carrier to show that it was occasioned by some act which is recognized

Negligence—
Burden of
proof.

as an exemption. This shown, it is *prima facie* an exoneration, and he is not required to go further, and prove affirmatively that he was guilty of no negligence. The proof of such negligence, if negligence is asserted to exist, rests upon the other party."

The doctrine in this case was reaffirmed in *Davis v. Railway Co.*, 89 Mo. 340, 26 Am. & Eng. R. Cas. 315, and again in *Witting v. Railway Co.*, 101 Mo. 631, 639, 45 Am. & Eng. R. Cas. 369. So far as this question is concerned, it is not easy to discover any distinction between the Witting Case and the case at bar. The court in that case says: "It must therefore be taken as the established law of this state that, when the cause of action stands on the ground of negligence on the part of the carrier, the burden of proof is on the part of the plaintiff. The authorities cited are not all agreed as to the ground upon which the rule stands. The true reason, it seems to us, is that negligence is a positive wrong, and will not be presumed, though it may be inferred from circumstances. When the carrier brings himself within the exemption, he need go no further to relieve himself from his liability as insurer. The party who founds his cause of action upon negligence must be prepared to establish the assertion by proof."

In *Otis Co. v. Missouri Pac. Ry. Co.*, 112 Mo. 622, it was held, in an action against a railway company for the loss of property from fire, wherein it was agreed that the bill of lading contained an exception exempting the company from liability from loss thus occasioned, the plaintiff, to entitle him to recover, must show that the fire was the result of the company's negligence, and the burden of proving such facts rests upon him. We must therefore rule this point against the plaintiff.

On objection being made by defendant, the testimony of witnesses for plaintiff, Gicquell and Haskell, tending to prove the ownership by the railroad of the building in which the fire started; that it had been leased to the Wilcox Lard Company for seven or eight years; that it was so used and in such condition as to be very inflammable and dangerous in the freight yard; that it had caught fire about a year before the fire which destroyed plaintiff's property; and that the lard company, after the last fire, moved its works some distance away; and that the storage house then stood where the old building stood,—was excluded by the court, in which it is contended that error was committed. It is argued that this evidence was admissible for the purpose of showing negligence upon the part of the de-

Pleading and
proof.

fendant in storing the flour in a place where it might reasonably have been apprehended that it was in danger from fire; and that defendant, by the exercise of reasonable diligence, might have saved the flour after the fire started.

With respect to the first objection under this point, the cause of action is predicated upon the failure of defendant to exercise reasonable and ordinary care of said flour while it was stored, by reason of which it was consumed by fire. The petition alleges that defendant "stored the flour in a warehouse owned and managed by the defendant," and "that defendant failed and neglected to exercise reasonable care of said flour while so stored." No place is to be found in the petition where it is averred that by reason of its proximity to a refining establishment, or for any other reason, the warehouse was not a safe one in which to store the flour. The evidence was clearly inadmissible under the allegations in the petition, and was properly excluded. *Yarnell v. Railway Co.*, 113 Mo. 570. It had no tendency whatever to show that the warehouse itself, by reason of its infirmities or manner of construction was unsafe, which was the effect of the averment in the petition.

Nor was the evidence of the removal of the Wilcox Lard Company's Works, after the fire, and the rebuilding of a warehouse on the same site immediately subsequent to the fire, competent to show that defendant knew it should never have permitted such business to be carried on in its freight yards. Such evidence was not admissible to show negligence on the part of the defendant in failing to store the flour in a suitable warehouse, for that must be made out by proof of the condition of the warehouse in which the flour was stored. *Brennan v. City of St. Louis*, 92 Mo. 488, 16 Am. & Eng. Corp. Cas. 486; *Mitchell v. Plattsburg*, 33 Mo. App. 555; *Alcorn v. Railroad Co.*, 108 Mo. 81; *Mahaney v. Railroad Co.*, 108 Mo. 191. And it is not claimed that it was not reasonably safe on account of any infirmities that it possessed.

Defendant, under the evidence as disclosed by the record, was in no way responsible for the fire in the first place, and seems to have done everything possible with the agencies at its command after it had broken out, to stay its progress, and to protect its own property, and that which was under its control. We cannot say that the verdict was not for the right party, nor do we think that it was properly set aside for either of the causes assigned in the order of the court, or motion for a new trial. As there is nothing in the record which warranted the court in granting a new trial, its order in so doing is set aside, and the cause remanded, with direction to the

court below to enter up judgment on the verdict in favor of the defendant.

All of this division concur.

Limitation of Liability by Carrier.—See *Merchants' Dispatch Transportation Co. v. Furthmann*, *ante*, p. 145, and note, 150.

Burden of Proof in Actions Against Carrier.—See *Western Railway of Alabama v. Harwell* (Ala.), 45 Am. & Eng. R. Cas. 358, and note, 367.

DAVIS & GAY

v.

CENTRAL VERMONT R. Co.

(66 *Vermont*, 290.)

Limitation of Liability by Carrier.—A common carrier may by contract, limit his common-law liability for goods intrusted to him so far as in the eye of the law will be considered reasonable, but he cannot contract for relief against his own negligence.

Acceptance of Bill of Lading as Presumption of Assent to Contract Therein.—The assent of a shipper to a contract embodied in a bill of lading will be presumed from the fact of his acceptance of the bill of lading.

Reasonableness of Stipulation Limiting Liability of Carrier.—A stipulation in a bill of lading exempting a carrier from liability for loss by fire not happening by its neglect, is reasonable.

Liability of Carrier for Loss of Grain by Fire—Delay in Transportation—Proximate and Remote Cause.—In an action to recover for grain destroyed by the burning of an elevator in which it was stored it appeared that in the course of shipment from West to East, the elevator was used to store grain ordered forwarded by shippers, and that an order had been given by the shipper to forward the grain in question some time before the burning of the elevator. The court below found that the defendant carrier was guilty of negligence in not forwarding the grain soon after receiving the order; that but for this negligence the grain would not have been in the elevator at the time, but that the fire itself occurred without any fault on defendant's part. *Held*, that defendant was not liable, for the reason that the fire was the proximate cause of the damage and the delay in forwarding only the remote cause.

EXCEPTION from Rutland county court.

The plaintiff claimed to recover for the amount of certain grain which was in transit from Chicago to Rutland, Vt. As evidence of his title to said grain, he introduced certain through bills of lading, which contained, among other conditions, the following :

Case stated.

"The said Ogdensburgh Transportation Company shall not, nor shall any carrier, or any person or party in possession of all or any of said property, be liable for any

loss or damage of or to all or any of said property, arising from, caused by, or connected with any one or more of the following-mentioned causes or things, to wit: * * * Fire, while afloat, in transit, or in store, at any place of shipment, transshipment; station, delivery, or on board of boat or cars, * * * unless the same shall affirmatively, and without presumption, be proven to have been caused by the negligence of the person or party sought to be made liable."

In the ordinary course, grain shipped by this route is taken by water from Chicago to Ogdensburgh, N. Y., and is there placed in the elevators of the defendant, where it is stored until the shipper orders it sent forward to its destination. The grain in question had been placed in the elevator of the defendant for some time before the fire, and had all been ordered forward for periods varying from more than 30 to 7 days before its loss. The elevator and its contents were burned September 9, 1892. The county court found that the defendant was negligent in not having sent the grain forward sooner, and that, if the grain had been sent on with reasonable diligence, it would not have been in the elevator at the time of the fire, but that the fire itself occurred without the neglect of the defendant.

J. C. Baker and Geo. E. Lawrence, for plaintiffs.

C. A. Prouty, for defendant.

Ross, C.J.—The controlling facts found by the county court are that the grain, for the loss of which recovery is sought, came to the defendant from the Ogdensburgh Transportation Company, shipped by wholesale dealers from Chicago on bills of lading running to the order of the shipper; that the plaintiffs purchased the bills of lading, usually, after the grain had arrived at Ogdensburgh, and had been received by the defendant into its elevator; that the bills of lading, among other things, provided that the Ogdensburgh Transportation Company, and any other common carrier in the line of transportation, should not be liable for any loss by "fire, while afloat, in transit, or in store, at any place of shipment, transshipment, station, delivery, or on board of boat or cars, * * * unless * * * caused by the negligence of the person or party sought to be made liable;" that the grain was destroyed while in the elevator of the defendant at Ogdensburgh by a fire which occurred without the negligence of the defendant, but that, if the defendant had acted upon the orders of the plaintiffs, when their orders were necessary, and removed the grain from its elevator as soon as the county court has found it should have done, the grain would have

been removed before the fire. On these controlling facts, it is apparent :

1. That under our decisions (*Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 186; *Id.*, 18 Vt. 131; *Kimball v. Railroad Co.*, 26 Vt., 247; *Blumenthal v. Brainerd*, 38 Vt. 402; *Mann v. Birchard*, 40 Vt. 326; *Hadd v. Express Co.*, 52 Vt. 335; 6 Am. & Eng. R. Cas. 443; *Gillis v. Telegraph Co.*, 61 Vt. 461; 25 Am. & Eng. Corp. Cas. 568; and as held generally by courts of last resort, a common carrier may, by contract, limit his common-law liability for goods intrusted to him, so far as, in the eye of the law, will be considered reasonable, but that it is unreasonable to allow such a servant of the public to contract for relief against his own negligence. Usage may amount to such limitations. *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 18 Vt. 131. Notice, unless brought distinctly to the knowledge of the consignor, in such a manner that the law will imply his assent to the limitation contained in the notice, will not be considered as entering into, and forming part of, the contract. Bills of lading are contracts, or receipts and contracts. The carrier thereby acknowledges the receipt of the property to be carried; states the conditions on which he is to carry the property, the person to whom, and the place where, delivery is to be made, and the rate or compensation for the carriage. This he delivers to the consignor as evidence of the contract between them. By receiving the bill of lading the consignor assents to the terms of the consignment contained in it, and becomes bound thereby, so far as the conditions named are reasonable, in the eye of the law. In *Farmers' & Mechanics' Bank v. Champlain Transp. Co.*, 23 Vt. 206, this court said, in speaking of a contract that would limit the common-law liability of common carriers: "This express contract ought, perhaps, to be very clearly proved, and, in water carriage, is usually required to appear in the bill of lading." The entire scope of the decision in *King v. Woodbridge*, 34 Vt. 565, proceeds upon the theory that a bill of lading, duly delivered and accepted, forms a written contract between the consignor and carrier, which cannot be varied by parol evidence. So far as a bill of lading is a receipt, it has been allowed, sometimes, to be explained by parol evidence. *O'Brien v. Gilchrist*, 34 Me. 554, 56 Am. Dec. 676, and note. But as a contract of carriage of the goods, so far as it is reasonable, it is held to be a special written contract, not open to explanation by parol evidence. *Steele v. Townsend*, 36 Ala. 247, 79 Am. Dec. 49, and note; *Railroad Co. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664, and note; *McMillan v. Railroad Co.*, 16 Mich. 79, 93 Am. Dec. 208, and

note; *Chandler v. Sprague*, 5 Metc. (Mass.) 306, 38 Am. Dec. 404, and note; *Grace v. Adams*, 100 Mass. 505, 97 Am. Dec. 117, and note; *McFadden v. Railway Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, and note; *Graves v. Railroad Co.*, 137 Mass. 33, 16 Am. & Eng. R. Cas. 108.

Where the bill of lading is received by the consignor without objection, and nothing is shown to the contrary, the law

Effect of acceptance of bill of lading. presumes he accepts it, and becomes bound by its terms, as the contract for the carriage of the goods receipted for, and, if limitations are imposed upon the common-law liability of the carrier, that he consents to them, and is bound by them, so far as they are, in the eye of the law, reasonable. Nothing is found why the consignors named in the bills of lading, receipting for the grain lost, did not consent to the conditions set forth in them. The plaintiffs came into the rights of the consignors by an assignment of the bills of lading. Thereby, they became the consignees of the grain. As such, they took the rights of the consignors, to whose order the goods were consigned. Thereby, they obtained no greater rights than the consignors had, under the bills of lading. The counsel for the plaintiffs criticise the conditions contained in the bills of lading. Whatever may be justly said in regard to others of them, this case brings for consideration only the one already quoted, in regard to loss by fire. That exempts the carrier

Reasonableness of limitation. from liability only for such fires as occur without the carrier's negligence. Leaving the carrier responsible for losses which came from fires caused

by the carrier's negligence, the limitation was reasonable, under the decisions already cited. It is clearly expressed, and capable of ready comprehension. It is no excuse if the plaintiffs did not read and consider it. Courts are established neither to make contracts for the parties, nor to relieve them from such contracts as they negligently and carelessly enter into. They are to construe and give effect to contracts as made, so far as they are lawful. This eliminates the liability of the defendant for the loss, so far as it was occasioned by the fire, for that has been found to have occurred without the negligence of the defendant.

2. But it is contended that the delay or negligence of the defendant in not removing the grain as speedily as the county court has found that it ought to have done renders the defendant liable. It is evident that the fire was the

Liability of carrier. immediate, proximate cause of the destruction and loss of the grain. If the fire had not occurred, or if that cause is eliminated, the grain would not have been

lost. The *causa causans* was the fire. The concomitant incident was the delay by the defendant in removing it from the elevator. But that delay would not have destroyed the grain, and caused its loss, if the fire had not intervened. It is generally held that a common carrier is liable on the ground of negligence only when that negligence is the proximate cause of the loss. On this subject, and on what is the proximate and what the remote cause, these authorities are helpful: *Bohen v. City of Waseca*, 32 Minn. 176, 4 Am. & Eng. Corp. Cas. 631, 50 Am. Rep. 564, and note; *West v. Ward*, 77 Iowa, 323, 14 Am. St. Rep. 284, and note; *White v. Conly*, 14 Lea, 51, 52 Am. Rep. 154, and note; *Haverly v. Railroad Co.*, 135 Pa. St. 50, 43 Am. & Eng. R. Cas. 31, 20 Am. St. Rep. 848, and note; *Perley v. Railroad Co.*, 98 Mass. 414, 96 Am. Dec. 645, and note.

But courts differ in holding the carrier liable when his delay is the remote cause of the loss, and a proximate cause exists therefor, for which he is not liable. Courts of last resort, holding the carrier liable in such cases, are those of New York, followed by those of Missouri and Illinois. Holding that the carrier is not liable for such remote cause, are the courts of United States, Massachusetts, Pennsylvania, Ohio, Michigan, West Virginia, and Iowa. The cases of these states, *pro* and *con*, can be found collected in a note to *Norris v. Railway Co.*, 23 Fla. 182, 28 Am. & Eng. R. Cas. 66, 11 Am. St. Rep. 355. To the last-named class, apparently, should be added the courts of Nebraska and of Maine. *McClary v. Railroad Co.*, 3 Neb. 44; *O'Brien v. McGlinchy*, 68 Me. 557.

In some of the cases cited, holding the carrier liable, another element existed, in addition to the delay of the carrier in moving the goods to their destination, to wit, the exposure of the property to the action of the elements, which was observable to the carrier, like freezing, or the want of food and care when the property consisted of live animals. When the property is of a kind liable to injury or destruction by such exposure, whether moving the property with due dispatch, or delaying so to move it, the carrier is under a duty to use common prudence to protect the property from dangers which are known to him to exist, and which have come expectedly or unexpectedly; and, if the danger came without his fault, he may charge for the extra care. *Beckwith v. Frisbie*, 32 Vt. 559.

Some of the cases holding the carrier for delay might have been properly decided against him because, knowing the danger to which the property was exposed, he did not exercise the diligence and care of a prudent bailee to protect it.

In the case at bar, if the defendant could have protected the property from the fire, after it knew the fire existed, by the exercise of reasonable prudence and diligence, and did not, the defendant would have been liable, from its failure to use this measure of prudence and diligence, but not on the ground of its delay to move the grain earlier. I am not aware that any case exists where this court has held a party liable for the remote cause of an injury of this nature. The question has not often come before it.

In *Templeton v. Montpelier*, 56 Vt. 328, the proximate cause of the plaintiff's injury was the failure of the town to erect a proper guard-rail on the side of its highway; the remote cause, the fright of the plaintiff's horse at that point by a train of cars on the railroad running near the highway. The plaintiff knew that by going that road he was liable to encounter a train of cars, and that there was another highway to his place of destination, equally feasible, which would not bring him near a moving train of cars. The referee found that the plaintiff was negligent in using the highway, on which he was injured. This court held that the plaintiff's negligence was only remotely connected with his injury, and that it did not contribute to its proximate cause, and for that reason did not defeat his right of recovery.

This conclusion, in principle, is the same as that reached by the courts which hold that the carrier is not liable where his only fault is that of delay to move the consigned goods with such rapidity as the trier might consider reasonable. We think it is the better conclusion that in such cases, if the proximate cause of the loss arises in such a manner that it will not support an action, neither will the remote cause, though incidental to the proximate cause. If the proximate cause occurs without the fault of the carrier,—in other words, as to him, is accidental,—he cannot forecast when or where it may fall upon the goods intrusted to him to carry, or whether it will fall upon them at all. It is as likely to fall upon them when being moved with dispatch as when delay occurs. Being unconnected with it, he cannot forefend the property intrusted to him against it by the exercise of the utmost prudence and diligence. If he could forecast when or where it would occur, at times, it might be his duty to delay the movement of the property. In that way only could he protect the goods. But inasmuch as he cannot forecast that it will occur, nor when nor where it will occur, and is himself in no respect responsible for its occurrence, he is under no duty to the consignor or owner of the goods in regard to its occurrence.

Judgment reversed, and judgment for defendant to recover its costs.

Limitation of Liability by Carrier.—See *Merchants' Dispatch Transportation Co. v. Furthmann*, *ante*, p. 145, and note, 150.

Liability of Warehousemen for Destruction of Goods by Fire.—See *Lancaster Mills v. Merchants' Cotton Press & Storage Co.* (Tenn.), 45 Am. & Eng. R. Cas. 423, and note 457.

KIRK

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. Co.

(*Minnesota Supreme Court*, Nov. 16, 1894.)

Termination of Liability of Railroad Company as Carrier.—In the case of portable boxes or packages of valuable merchandise, the liability of the railway company as common carrier does not terminate until the goods are removed from the cars and placed in its freight-room, ready for delivery to the consignee, and the consignee has had a reasonable time thereafter to remove them.

Same—Liability of Company for Goods Stolen from Car at Destination.—A valuable box of merchandise was left in the car in which it was transported, and, over 48 hours after the car arrived at the place of consignment, was stolen from the car. It did not appear that there was any special reason for leaving the box in the car, or that there was any custom or agreement to deliver such packages to the consignee directly from the cars. *Held*, that defendant's liability as common carrier had not terminated.

APPEAL from Pipestone county district court.

Lorin Cray and *S. L. Perrin*, for appellant.

P. P. Cady, for respondent.

MITCHELL, J.—This action was brought to recover the value of certain goods delivered by plaintiff to defendant, a common carrier, for transportation, and which were stolen while in defendant's possession. Both the place of shipment and the place of destination were on defendant's road. The goods were contained in a box, and weighed 75 pounds, and were of the value of about \$70. The plaintiff shipped the goods consigned to himself. He did not reside, nor had he an agent, at the place of consignment, and his residence was unknown to the defendant. The car containing the box arrived at the place of destination about half-past 6 on Thursday evening, August 10th, but the goods were never unloaded from the car. The car was left "sealed," but not

Case stated.

locked. The last that was seen of the goods was Saturday evening, when the defendant's agent saw them in the car. When plaintiff called for them, on Monday morning, it was discovered that some one had broken the seal of the car and stolen the box. It does not appear where the car was left standing, or whether it was at a place suitable for delivery of goods to consignee. There was evidence that the "station" was open for the delivery of freight on Friday and Saturday from 7 A. M. to 6.30 P. M., but there is no evidence that this box was ready for delivery during that time, although it is perhaps fairly inferable from the circumstances that had plaintiff called for it on either of these days defendant's agent could and would have gotten it for him out of the car. No reason was shown why defendant left the box in the car, instead of placing it in the freight-room. It does not appear that the defendant had no freight-room, or that there was any necessity for keeping such portable packages in the car, or that there was any general custom at that station of delivering such packages from the car to the consignees. On this state of the evidence the court directed a verdict for the plaintiff.

The only question raised on this appeal is whether the defendant's liability as carrier had terminated when the goods were stolen, or, at least, whether, under the evidence, that question should not have been left to the jury. This court has had occasion in at least three cases to consider somewhat at length the old and somewhat mooted question when and under what circumstances the peculiar liability of a common carrier as such may be terminated before the goods have passed into the possession or custody of the consignee. *Derosia v. Railroad Co.*, 18 Minn. 133 (Gil. 119); *Pinney v. Railroad Co.*, 19 Minn. 251 (Gil. 211); *Arthur v. Railroad Co.*, 38 Minn. 95, 32 Am. & Eng. R. Cas. 449.

In the first of these cases it was held that if the consignee resides elsewhere than at or in the immediate vicinity of the place of final destination, has no agent there, and his residence is unknown to the carrier (which was this case), the carrier can place the goods in its freight-house, and after keeping them a reasonable time, if the consignee does not call for them, its liability as carrier ceases.

We do not mean to lay down as an inflexible rule, applicable to all cases, that in order to terminate the carrier's liability the goods must be removed from the car and put into the carrier's freight-house. The nature of some kinds of goods, such as coal, lumber, and the like, precludes this. It is usual for the consignees themselves to unload and carry away these kinds of freight directly from

Termination
of carrier's
liability.

Liability of
carrier.

the cars. It is also true, as suggested by defendant's counsel, that there is nothing to prevent a carrier, at least under special circumstances, from using the car as its warehouse for the storage of freight. But in the case of portable boxes or packages of valuable merchandise we think that, under any ordinary circumstances, public policy requires that it should be held the inflexible rule that in order to terminate the carrier's liability he must remove the goods from the car in which they were transported and place them for safe keeping in his freight-house.

We will take notice of the fact that it is the general custom to do so with this class of goods, and to deliver them to the consignees from the freight-room, and not from the car. To allow the carrier to terminate his liability for such kinds of goods by any less formal and expressive act would be against public policy. The unloading of cars may be, and often is, delayed for the mere convenience of the carrier; and to permit him in such cases to say that the cars constituted his warehouse for the time being, and that if the goods had been called for they would have been delivered to the consignee, and therefore he is not liable for their loss, would inaugurate a very dangerous rule. If the facts existed which had terminated defendant's liability as a common carrier, the burden was on it to prove them, and this it certainly failed to do, even under the most favorable view of the law. The court was right in directing a verdict for plaintiff.

We are by no means sure that this direction would not have been correct even conceding that defendant's liability was only that of a warehouseman; for it would seem grossly negligent to leave a car containing portable packages of valuable merchandise unlocked, and merely fastened with a strip of tin, called a "seal," which any one could easily remove.

Order affirmed.

GILFILLAN, C.J., absent on account of sickness; took no part.

When Liability as Carrier Ceases and Liability as Warehouseman Begins.—See *Columbus & Western R. Co. v. Ludden* (Ala.), 42 Am. & Eng. R. Cas. 404, and note 409; *Richardson v. Canadian Pacific R. Co.* (Can.), 45 Am. & Eng. R. Cas. 413, and note 422.

Duties and Liabilities of Carriers—Duty to Furnish Suitable Cars for Transportation.—In *Alabama & V. R. Co. v. Searles*, 71 Miss. 744, it was held that it is the duty of a railroad company to furnish suitable and proper cars for the transportation of goods delivered to it; that where there is nothing in the contract of carriage limiting its common-law liability as a carrier, it is bound, as an insurer, and for a failure in this respect, whereby injury results, it is liable. Citing *The Caledonia*, 43 Fed. Rep. 681; *Sloan v. Railway Co.*, 58 Mo. 220.

Duty to Give Correct Information as to Trains.—In *Cantwell v. Pacific Exp. Co.*, 58 Ark. 487, which was an action to recover for the loss of perishable property because, as alleged, of the negligence of the carrier in not complying with the contract of carriage, the court, of its own motion, instructed the jury that “It was the duty of the agent of the express company to give to shippers correct information about trains upon which he was allowed to forward express matter; and, if the jury believe from the evidence that said agent, at the time the venison was brought to him for shipment, agreed with plaintiff that he would forward the same by the night train of the same day the venison was received, and by such promise induced plaintiff to deliver the venison to the defendant for shipment, and that he (the agent) did not ship on that train, but afterward, without further notice to the plaintiff, shipped on a train of the next day, several hours later than the one by which he had agreed to forward the venison, and that, by this delay in shipment, the venison was spoiled and lost, they should find for the plaintiff;” and it was held that the court correctly stated the law applicable to the facts.

Liability of Carrier for Failure to Safely Transport Property Committed to it—Exposing Cotton to Danger of Fire—In *Thomas v. Wabash, St. L. & P. R. Co.* (Lancaster Mills, etc., Intervener (U. S. Cir. Ct., S. D. Ill., Sept. 24, 1894), 63 Fed. Rep. 200, it appeared that a shipment of cotton was left by the carrying railroad company in a place where it was exposed to the danger of ignition from sparks from passing steamboats and locomotives for eighteen days and until it took fire and was destroyed, and it was held that the delay and exposure were such negligence as would render the company liable. The court said: “The contention is made, however, by counsel for receivers that, even if unusual delay had occurred at Cairo after the arrival of the cotton, and before it was destroyed—which is denied—this would not render the receivers liable for the loss of the cotton burned, because such delay would, at the most, only be a remote, and not the proximate, cause of the loss of the cotton by fire. Many well-considered cases have been referred to by the learned counsel for the receivers in support of his position, and it may be that it announces a sound rule. It will be borne in mind, however, that the negligence imputed to the carrier in this case in the petition is not merely delay, but ‘that the loss of the cotton by said fire was the result of the carelessness and negligence and delay of said receivers while the said cotton was in their possession, in course of transportation in pursuance of the contract of transportation as aforesaid.’ If mere delay constituted all the alleged negligence to be found in the pleadings and evidence, the question might present less difficulty, for the negligence must be the proximate, and not the remote, cause of the burning, to render the carrier liable. Had lightning set the cotton on fire, or had one of the frequent river storms destroyed it, the delay preceding the accident might not be regarded as the proximate cause of the destruction; and in such or a like case in facts or principle the cases cited by counsel for the receivers, of *Railway Co. v. Reeves*, 10 Wall. 176; *Morrison v. Davis*, 20 Pa. St. 171; *Denny v. Railroad Co.*, 18 Gray, 481; *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 49 Am. & Eng. R. Cas. 137; *New York Lighterage & Transp. Co. v. Pennsylvania R. Co.*, 43 Fed. Rep. 172; *Hoadley v. Transportation Co.*, 115 Mass. 304; and others on that line, would be in point. The petition, however, and the evidence in support of it go far beyond mere delay, charging and proving satisfactorily that the carrier company, on reaching Cairo with the cotton, on December 10th, did not proceed to North Cairo, where the Cairo, Vincennes & Chicago Line had a wharfboat from which cotton on that line of transit was carried up an incline, by tracks, into the cottonshed, to be loaded on cars for the east, but, on the contrary, tied up Barge

49, containing the cotton, a distance of more than one mile, at the foot of Tenth street, at the public levee, in a position not only exposed to the sparks of passing steamboats, but in close proximity to the tracks of the Illinois Central Railroad upon the top of the levee. A position more exposed to sparks from the numerous vessels in a busy harbor, and from the smokestacks of the engines almost constantly passing on the railroad, could not have been chosen in Cairo. And it was at this exposed point that the barge containing the cotton was moored till it was destroyed by fire on the 28th of December; the fire originating most likely from sparks emitted from boats on the river or engines on the levee. It is not mere delay, therefore, but negligent delay in a dangerous place, wilfull, it may be said, and deliberate exposure of the cotton to danger from fire, that fixes the liability of the carrier. The danger could have been foreseen, should have been foreseen, and guarded against."

Liability of Carrier—Loss of Goods by Wrong Delivery.—In *Savannah, F. & W. R. Co. v. Sloat* (Ga., April 23, 1894), 20 S. E. Rep. 219, it was held that loss of goods by a wrong delivery, made negligently by the carrier, is a conversion for which the carrier is liable to account at the full value of the goods, this mode of loss not being within the terms of the special contract fixing a conventional value upon the goods at the time of shipment in consideration of the rate of freight being reduced; and that, even granting that it was competent for the parties to make a contract which would have covered wrong delivery by negligence, they did not do so. *Distinguishing Railroad Co. v. Reid*, 91 Ga. 377, 55 Am. & Eng. R. Cas. 363; *Railroad Co. v. Pickett*, 87 Ga. 734.

Transportation of Locomotive with Engineer and Fireman in Charge—Negligence of Conductor of Transporting Company.—In *Terre Haute & I. R. Co. v. Chicago, P. & St. L. R. Co.*, 150 Ill. 502, it appeared that a railroad company undertook to transport a locomotive engine over its road between certain points for a fixed price per mile, the owners of the locomotive to furnish the engine-driver and fireman, but that its time of starting and stopping, its side-tracking, and the like were to be under the control of the company owning the line; that a conductor of such company in charge of the transportation disobeyed an order of the train-despatcher, and that a collision occurred whereby the engine was damaged, and it was held that the company which had agreed to transport the engine was liable for the damages sustained.

Presumption of Negligence Arising from Condition of Goods on Arrival at Destination.—In *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170, it was held that if no explanation is given as to how goods in charge of a carrier for transportation suffered injury, a presumption of negligence arises against the carrier which is sufficient to justify a recovery in cases where there is no other proof than of a delivery of the goods to the carrier in good condition, and their arrival at their point of destination in a damaged condition. *Citing Express Co. v. Sand*, 55 Pa. St. 140; *Grogan v. Express Co.*, 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9.

Right of Carrier to Have Question of Negligence Passed on by Jury.—In *Buck v. Pennsylvania R. R. Co.*, 150 Pa. St. 170, which was an action by a shipper against a railroad company to recover for damages to stoves which had suffered injury in course of transportation, it appeared that the stoves were of a fragile character, and that they had been shipped in good order, carefully packed; that there had been no collision or wreck in the course of the transportation, but that the goods were delivered in a damaged and broken condition, and the court instructed the jury that the carrier, not having limited its liability by the contract of shipment, unless it could show how the damage occurred, a legal presumption would arise that it was liable therefor; and it was held that the instruction was erroneous, as tending to

leave the jury to think that they must find for the plaintiff, unless the defendant had shown distinctly the actual facts and circumstances of an accident, and that the absence of such distinct proof did not deprive the carrier of the right to have the question of negligence considered upon all the testimony.

Construction of Policy of Fire Insurance Covering Liability as Carrier and Warehouseman.—In *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, a policy of insurance, whereby a railroad company was insured "on flour, corn, grain, seeds, provisions, and other merchandise, excluding petroleum or its products; it being understood and agreed that the insurance under this head is to cover the liability of the insured as carriers and warehousemen, as well as their own property, * * * while contained in their elevator situated at Gladstone, Mich.," was construed as an insurance for the benefit of the railroad company only to the extent of its liability as carrier and warehouseman.

Action on Policy of Insurance of Carrier's Liability—Measure of Damages—Varying Written Instrument—What Constitutes Liability as Carrier and Warehouseman.—In *Minneapolis, St. P. & S. S. M. R. Co. v. Home Ins. Co.*, 55 Minn. 236, it was held that in an action on a policy of insurance issued to a railroad company as carrier and warehouseman the bills of lading fixing the liability of the plaintiff to the shippers as carrier and warehouseman are the measure of defendant's liability to the plaintiff, and cannot be varied by parol evidence; that in an action to enforce rights dependent on a written contract, although the suit be between strangers to the instrument, or between a stranger and one of the parties to the contract, the rule against varying a written instrument applies; and that a liability incurred by the plaintiff on a collateral contract to procure insurance on the property of shippers was not a liability as carrier or warehouseman within the meaning of the policy.

What Constitutes a Transportation or Conveyance of Intoxicating Liquor under Statute Prohibiting Such Transportation within the State.—In *State v. Rhodes* (Iowa, May 8, 1894), 58 N. W. Rep. 887, it was held that the act of an agent of a railroad company in removing a box containing alcoholic liquor from the platform of a railroad station to the freight-room was a violation of section 1558 of the Code as amended (McClain's Code, § 2410), rendering such an agent liable to fine and imprisonment for transporting or conveying intoxicating liquors from "one place to another within this state."

GREGG

v.

ILLINOIS CENTRAL R. Co.

(147 *Illinois*, 550.)

Termination of Liability of Railroad Company as Carrier.—Liability of a railroad company as a common carrier ceases upon the unloading of the goods from its cars at the place of destination and placing them in a safe and secure warehouse.

Same.—As to goods which a carrier is not required or expected in the usual course of business to remove from its cars, such as grain in bulk, coal,

lumber and the like, the liability of the company as carrier ceases when the cars, containing the goods, are delivered in a convenient position for unloading at the elevator, warehouse, or other place designated by contract or required in the usual course of business; or if no place of delivery is thus designated or required, on its side-track in the usual and customary place of unloading by the consignees.

When Contract of Carriage Terminates.—In the event of a failure of the consignee to designate a place of delivery, the contract of carriage would determine when the cars, in proper and safe condition, were placed at the usual and ordinary place of keeping or storing cars containing like freight upon the company's tracks where they can be safely and conveniently loaded.

Same—Test as to Termination of Contract—Nature of Liability of Carrier After Termination of Carriage.—In determining as to whether a contract of carriage is at an end, the question is whether anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination; if there is, its liability of carrier continues; but if there is not, and the goods remain in the carrier's possession, its liability in respect thereof, when not varied by contract or usage, is as warehouseman only.

Storage of Grain by Delivering Company with Brokers of Shippers as affecting the Relation of the Parties.—Plaintiff shipped two car loads of corn in bulk from a point in Illinois to a point in Georgia to his own order, with directions to notify D. & Co., and three days thereafter made another shipment of three car-loads from another point in Illinois to the same point in Georgia, with the like directions. The corn reached its destination over a terminal line of railway from 9 to 15 days after shipment, and the bills of lading were attached to drafts of D. & Co., which were negotiated by plaintiff. On the day of the arrival of the last shipment in Georgia, D. & Co. wrote to plaintiff to the effect that there was no market for the goods, and suggested that plaintiff make new drafts on them, and thereby gain about 15 or 16 days in which to place the shipment. On the arrival of the grain the terminal company notified D. & Co and requested storage of the grain with them; they being warehousemen, and the corn, not being taken by the consignee, was stored in D. & Co.'s warehouse, the delivering company taking their receipt to itself, and thereafter an extraordinary and unusual flood occurred whereby the grain in the warehouse was damaged, occasioning the loss complained of. *Held*, that the effect of the arrangement between D. & Co. and the terminal company was to constitute the former warehousemen for the plaintiff, and that D. & Co. thus held the property for him subject only to the lien of the railroad company for its charges.

Liability of Delivering Company for Storage in Unsafe Warehouse—Damages by Extraordinary Flood.—It appeared from the evidence that the warehouse was a safe and secure place for storing the grain, and it was held that the company was not in fault for storing it in such warehouse and for its damage by an unprecedented and extraordinary flood, although there were other places available for storage upon higher ground which were not affected by the flood.

Liability of Company for Negligence Not Contributing to Injury.—The failure of the carrier to give the plaintiff notice of the neglect of D. & Co. to receive and take care of the grain did not render the carrier liable for the damage to the grain where such failure did not operate to plaintiff's injury.

Duty of Company to Keep Grain in Cars on its Track for Unreasonable Time.—The company was under no duty to keep the grain on its track for a period of 15 days or more to the detriment of its other business.

Nature of Holding of Warehouseman.—The deposit of the grain by the terminal company in the warehouse being for the purpose of preserving its lien on the goods for advances and charges, the holding of the warehouseman was for both the owner and the carrier.

APPEAL from the appellate court, first district.

On the 25th of July, 1888, appellant shipped by appellee's road two car-loads of corn, in bulk, from Lodi, Ill., and on July 28, 1888, three car-loads from Ludlow, Ill., consigned "Order Jas. Gregg & Co., Augusta, Georgia," with directions

to "notify Dunbar & Co." The record shows that the five car-loads of corn reached Augusta during the period from August 2 to August 11, 1888, over the Georgia Railroad, the terminal connecting line of railway over which the corn was transported. The bills of lading were attached to drafts, at 10 days' sight, on Dunbar & Co., which were discounted by appellant in Chicago. On the 11th day of August, 1888, Dunbar & Co. wrote appellant as follows :

" AUGUSTA, Ga., 11, 1888.

" Messrs. Gregg, Garvey & Co., Chicago, Ill.: Dear Sirs—Inclosed please find certificate for weight of cars No. 11,724 and No. 3038, for which you asked, and also for car 2500, I. C., which loses heavily. No demand for grain to-day. Market is stocked. A large lot of stuff was brought here prior to the advance in freight, and this being our tightest money season, anyway, everybody has been cramped to pay for it. Our banks protected drafts, and loaned on until they too became cramped, and refused to lend any more. The situation is worse than last season, when, you remember, the same thing occurred. The best way we can see out of the difficulty in meeting your drafts, which begin to mature next week, is to draw back on you for them as they mature, and then let you make new 10-day drafts on us; and in this way we can gain about 15 or 16 days, and in that time hope to place a great part of it. We can arrange to take care of the stuff itself without having to keep on track. We will begin to draw on Monday. We await your favors.

" Yours, truly,

DUNBAR & Co."

This suggestion was followed, Dunbar & Co. drawing upon appellant to meet the drafts of appellant upon them as they matured, and attaching the bills of lading issued to appellant, and originally attached to his drafts, as collateral to the drafts thus drawn by Dunbar & Co. upon appellant. These drafts were paid by appellant in Chicago, and other drafts, at 10 days' sight, with the bills of lading attached, were drawn on Dunbar & Co. Dunbar & Co. were notified, upon the arrival of the grain, and requested its storage with them, they being warehousemen and brokers at Augusta, Ga.

The corn not having been taken by the consignee, the Georgia Railroad finally stored the same in Dunbar & Co.'s warehouse, taking their warehouse receipts to the Georgia Railroad Co, the last receipt being dated August 23, 1888. On September 10, 1888, there occurred an extraordinary and unusual flood, which submerged the corn in the warehouse, and damaged it. Dunbar & Co. sold \$1386 worth of the damaged corn. The balance proved a total loss. This suit is brought to recover the value of the corn lost and damaged.

Otis & Graves, for appellant.

C. V. Gwin, for appellee.

SHOPE, J. (after the foregoing statement).—The principal question presented is whether the relation of appellee to the corn shipped by appellant was that of a common carrier at the time it was damaged. It is suggested, rather than argued, that appellee, as the initial carrier, Question presented. limited, by contract, its liability for damages to such as might occur while carrying upon its own lines of road, and that it is not, therefore, liable for the conduct of connecting lines, over which the freight was carried to its destination. In the view we take of the case, it is unnecessary to discuss or determine this question. See *Railroad Co. v. Frankenberg*, 54 Ill. 88; *Chicago & N. W. Ry. Co. v. Northern Line Packet Co.*, 70 Ill. 217; *Railway Co. v. Wilcox*, 84 Ill. 239; *Railroad Co. v. Jaggerman*, 115 Ill. 407, 23 Am. & Eng. R. Cas. 680. Conceding the liability of appellee for the acts and misfeasance of connecting lines, we are of opinion the relation of common carrier had ceased before injury to the property occurred.

The law is well settled, in this state, that the liability of a railroad company as a common carrier of freight ceases upon the unloading of the goods from the car at the place of destination and placing them in a safe and secure warehouse, or where the carrier is not required, in the usual course of business, or expected, to remove the freight from the car,—as in the case of grain Termination of liability as carrier. in bulk, coal, lumber, and the like,—by delivering the car, in a safe and convenient position for unloading, at the elevator, warehouse, or other place designated by the contract, or required in the usual course of business, or, if no place of delivery is thus designated or required, on its side-track, in the usual and customary place for unloading by consignees. *Porter v. Railroad Co.*, 20 Ill. 407; *Railway Co. v. Alexander*, *Id.* 23; *Richards v. Railroad Co.*, *Id.* 404; *Railroad Co. v. Scott*, 42 Ill. 132; *Transportation Co. v. Hallock*, 64 Ill. 284; *Railway Co. v. Mitchell*, 68 Ill. 471; *Railway Co. v. Bensley*,

69 Ill. 630; *Cahn v. Railway Co.*, 71 Ill. 96; *Transportation Co. v. Moore*, 88 Ill. 136; *Railway Co. v. Nash*, 43 Ind. 423; *Railway Co. v. Felder*, 46 Ga. 433.

In the case at bar, upon the arrival of the corn at its destination,—there being no designated warehouse or place of delivery, and it not being shown that, in the usual course of

Termination of contract of carriage. business, the carrier was bound to deliver at any particular place,—it is to be presumed that the consignee was to receive the same on track, and, in the event of a failure of the consignee to designate a place of delivery, the contract of carriage would determine when the cars, in proper and safe condition, were placed at the usual and ordinary place of keeping or storing cars containing like freight, upon the railroad company's tracks, and where they could be safely and conveniently unloaded. In all such cases the question to be determined is whether

Test as to termination of contract. anything remains to be done by the carrier in completion of its contract to safely carry and deliver the goods at the place of destination. If there is, its liability as carrier continues. If there is not, and the goods remain in possession of the carrier, its liability in respect thereof, when not varied by contract or usage, is as warehouseman, only. *Railroad Co. v. Warren*, 16 Ill. 502; *Peoria & P. U. Ry. Co. v. United States Rolling Stock Co.*, 136 Ill. 643, 49 Am. & Eng. R. Cas. 81; *East St. Louis Connecting Ry. Co. v. Wabash, St. L. & P. Ry. Co.*, 123 Ill. 594, 32 Am. & Eng. R. Cas. 522; *Missouri Pac. Ry. Co. v. Chicago & A. Ry. Co.*, 25 Fed. Rep. 317, 23 Am. & Eng. R. Cas. 718; *Independence Mills Co. v. Burlington, C. R. & N. Ry. Co.*, 72 Iowa 535, 32 Am. & Eng. R. Cas. 456; *Goold v. Chapin*, 10 Barb. 612; *Ang. Corp.* 291; *Hutch. Carr.* § 356.

This freight was consigned by appellant, to his own order, to Augusta, Ga., with instructions to the carrier to "notify Dunbar & Co." There is no pretense that the grain was not properly carried, in good order, to its destination, and was there in proper position for delivery to the consignee in apt time, or that notice was not given to Dunbar & Co. promptly, upon the arrival of the freight. The carrier had completed its contract of carriage, and obeyed the instructions of the consignor, in giving notice, in apt time, of the arrival of the grain at destination. It is not shown when the various consignments of corn arrived in Augusta, but it is clear that one of the cars—2500 I. C.—had reached its destination before the 11th of August, 1888; and it is also apparent that all five of the cars containing the corn sued for arrived before the 23d of August, 1888. But how long prior to these dates the shipments were completed, does not appear.

It is insisted, however, that the contract of carriage was not completed, because notice of the failure of Dunbar & Co. to take the corn was not given to the consignor; and it is shown that the course of dealing was for appellee to notify appellant of the failure of the consignee, or person to be notified, to take the shipment, and it is insisted that appellant was justified in relying upon such notice being given, and that, if notice had been given, he could have cared for the corn, by storing it, or shipping it elsewhere, in which event the loss would not have occurred. We do not find it necessary to determine whether, under the course of dealing shown, appellee would not be liable for failure to give such notice. The loss or injury to the corn occurred by the flood of September 10th, following the arrival of the corn in Augusta; and, conceding that the flood was a cause for which the railroad company was not responsible, it is said that the negligence of the railroad company in not giving such notice contributed immediately to the loss, and it is therefore liable. This contention is without force, for the reason that it is affirmatively shown that appellant was notified by Dunbar & Co. Dunbar & Co. were not entitled to receive the corn, except upon payment of the drafts drawn against it, and production of the bills of lading. *Railroad Co. v. Herndon*, 81 Ill. 143; *Joslyn v. Railway Co.*, 51 Vt. 92; *Railway Co. v. Stern*, 119 Pa. St. 24, 35 Am. & Eng. R. Cas. 551; *Watson v. Tunnel Line Co.*, 13 Mo. App. 263; *Wood*, Ry. Law, p. 1594. By the letter of Dunbar & Co. of August 11, as we have seen, appellant was notified of the arrival of at least one of the cars of corn in controversy, and that, because of the condition of the market, Dunbar & Co. would be unable to meet the drafts drawn against the shipment. Thereupon, the brokers suggested, as will be seen, a plan by which the time could be extended 15 or 16 days, to enable Dunbar & Co. to sell the corn in Augusta. It is clear, we think, from the language of this letter, and the subsequent conduct of the parties, that this referred, not only to the corn then on track, but to the shipments that were immediately to follow. The suggestion was that Dunbar & Co. would draw upon appellant to cover the drafts of appellant upon them as they matured, accompanying their drafts by the original bills of lading, as collateral; that Dunbar & Co. could arrange to take care of the corn without having to keep it on the railway track; and that they would commence drawing on the following Monday, and appellant could redraw on Dunbar & Co. at 10 days, etc. Appellant accepted the proposition of Dunbar & Co., paid the drafts drawn by them, and redrew at 10 days, again discount-

Effect of storage by delivering company.

ing these drafts in Chicago. The transaction shows that appellant knew that Dunbar & Co. were unable to realize upon the grain, and thereby pay the first drafts, and take up the bills of lading, upon the presentation of which, only, would they be entitled to receive the corn, and that the purpose of the arrangement entered into and carried out was to gain time, to enable them to sell the corn at Augusta. Appellant was advised that, within the 15 or 16 days thus to be gained, "we [Dunbar & Co.] hope to place a great part of it." He also was advised that Dunbar & Co. proposed to get the corn off the railroad track, and was told: "We can arrange to take care of the stuff, itself, without having to keep it on the track." The testimony of appellant shows that, when his drafts for "this grain" matured, Dunbar & Co. paid them by making demand drafts back on appellant, with the original bills of lading attached, which he paid, and made new drafts at 10 days, with the bills of lading attached; that these latter were accepted by Dunbar & Co., but not paid.

We think no one can read this record without being convinced that it was understood by the parties that this arrangement, which appellant admits he accepted, related to all the corn now in controversy. It is manifest, not only that the appellant knew that Dunbar & Co. had not received the corn, but that they were not entitled to receive it, and also that appellant voluntarily arranged to leave the corn under the control of Dunbar & Co. for sale at Augusta. It was clearly, we think, within the contemplation of the parties that the corn was to be taken from the railroad track under an arrangement to be perfected by Dunbar & Co., and the corn to remain in Augusta, to be sold by them. This was the sole purpose of the arrangement carried out. And it is clear, therefore, that if any duty existed on the part of the railroad companies to give notice of the failure of Dunbar & Co. to produce the bills of lading, and claim the grain, their failure in no wise operated to the injury of appellant.

It is urged that the railroad company was at fault in depositing the grain with Dunbar & Co., whose warehouse was submerged by the flood, when there were other elevators and warehouses at Augusta, upon higher ground, and which were not afflicted by the flood, in which the grain might have been stored. The question of whether it could have been thus stored may be said to be a controverted question of fact. But waiving that, and also, for the present, the question of whether Dunbar & Co. were not the agents of appellant to take care of and store the grain, the court was justified in holding, as it did, in effect,

Negligence not
contributing
to injury.

Storage in un-
safe warehouse.

in its rulings upon the propositions offered, that the railroad company was not liable because of storing with Dunbar & Co. That the warehouse of Dunbar & Co. was a safe and secure place for storing the grain, except for the flood mentioned, is unquestioned. That the flood was unprecedented and extraordinary, both in the rapidity of its rise and extent, is clearly shown. Many of the witnesses had resided at Augusta from 25 to 30 years, and all testify that no flood endangering the warehouse or its contents had occurred, within their knowledge. It appears from the evidence that business streets of the city were under water; stocks of goods destroyed; the railway company's tracks and depot submerged. It is apparent from the record that no foresight, however prudent and careful, could have anticipated damage to the corn from that source. The railroad company was not required to keep the corn in its cars on track indefinitely; and although the consignee was in default, in not receiving the freight after reasonable time and opportunity had been afforded in which to take it, the carrier could not abandon it, but was required to exercise ordinary and reasonable care for its preservation, as warehouseman. In the exercise of such care, it might leave it in the cars, store it in its own warehouse, assuming the liability of bailee or warehouseman therefor, or it might, with the exercise of like degree of care in selecting a responsible and safe depository, store the grain in an elevator or warehouse, at the expense and risk of the owner, and thereby discharge itself from further liability. *Railway Co. v. Alexander, supra*; *Richards v. Railroad Co., supra*; *Porter v. Railroad Co.*, 20 Ill. 407 (approved in *Davis v. Railroad Co.*, 20 Ill. 412, and other cases *supra*); *Clendaniel v. Tuckerman*, 17 Barb. 189; *Fisk v. Newton*, 1 Denio, 45; *Goold v. Chapin, supra*; *Transportation Co. v. Barber*, 56 N. Y. 544; *Railroad Co. v. Kidd*, 35 Ala. 209; *Smith v. Railway Co.*, 7 Fost. (N. H.) 86; *Hutch. Carr.* 488.

It is insisted, and a proposition was submitted presenting the contention, that Dunbar & Co. were the agents or warehousemen of the Georgia Railroad, and they having failed, as it is alleged, to use proper efforts to dry the corn after its having been submerged, that appellee is liable for the damages thus occasioned. It is shown that corn, after having been wet and re-
Duty of company to keep grain on track.
 remaining under water three or four days, as this was, may be dried, and that it will sell in market for something less than sound corn. This contention is based principally upon the fact that the Georgia Railroad Company took the receipts of Dunbar & Co., as warehousemen, to itself. Waiving the question, not made by counsel, as to the liability of the initial carrier for the conduct of the terminal connecting line after the

carriage had ceased, and the liability of warehouseman has attached, we are of opinion, upon the facts shown, there was no liability on the part of appellee for the negligence of Dunbar & Co., if any is shown in the respect indicated. The grain was detained at Augusta by the consent of appellant, with the understanding that 15 or 16 days' time could be gained by the arrangement of drawing and redrawing before mentioned, in which Dunbar & Co. might dispose of it. If, by such an arrangement, appellant, without the consent of appellee or the terminal line, could continue the liability of the Georgia Railroad as warehouseman for 15 days, and compel it to keep the grain on track, and bind appellee as the initial carrier, it could do so for 30, 90, or any number of days. The effect would be that railroad companies would be compelled to retain their cars on track indefinitely, and their tracks become blocked with cars awaiting the convenience of consignees. There is no duty attaching to the common carrier, of this character.

It seems to be well settled that the carrier has a lien upon the goods transported for its charges, while it retains dominion and control of the same. The rule, undoubtedly, is, as between the lienor and general owner, that a lien can exist only while the lienor retains possession of the property. If he deliver possession, the lien is gone. *Skinner v. Upshaw*, 2 *Ld. Raym.* 752; *Sodergren v. Flight*, 6 *East*, 622; *Forth v. Simpson*, 13 *Q. B.* 680; *Bigelow v. Heaton*, 4 *Denio*, 496; *McFarland v. Wheeler*, 26 *Wend.* 467; *Wingard v. Banning*, 39 *Cal.* 543; *Reineman v. Railroad Co.*, 51 *Iowa*, 338; *Hutch. Carr.* § 479; 2 *Pars. Cont.* *207, note *e.* The terminal carrier, upon the default of the consignee to receive the grain, might have stored in the warehouse of a responsible third person, in the name and for the benefit of the consignee alone. It is unnecessary to discuss here what would have been the effect of such storing, with notice to the warehouseman of the lien of the railroad company for its freight charges, or whether its lien could have been thus preserved. What the terminal railroad company did, was to deposit it in its own name, thereby preserving its lien. The warehouseman held the property for the benefit of both the carrier and consignor; for the carrier, for the purpose of preserving its lien. *Transportation Co. v. Barber*, *supra*; *The Eddy*, 5 *Wall.* 481; *Brittan v. Barnaby*, 21 *How.* 527; *Alden v. Carver*, 13 *Iowa*, 253.

The storing of the grain with Dunbar & Co. was for the benefit of the owner, subject only to the condition of his discharging the lien by paying the freight. This was, we think, the legal effect of this transaction. Dunbar & Co had pro-

posed to arrange for taking care of the corn, for the benefit and convenience of appellant, without leaving it on track. The evidence shows that the railroad company claimed the right to charge one dollar per car for each 24 hours the car remained upon its track, unloaded, after the expiration of 48 hours after the arrival of the car at destination. Appellant, as he testifies, accepted the proposition of Dunbar & Co.; and, as we have seen, the parties acted upon it, and carried it out. The evidence shows that Dunbar & Co. applied to the railroad company, and proposed storage of the corn in their warehouse, and went to the trouble of sacking it, to enable them to get it off the track. What was done was in furtherance of the proposition made in appellant's interest by his broker, who, as between the railroad company and appellant, must, in respect of this transaction, be regarded as the agent of the latter. The railroad company was not bound to waive its lien for its charges, under the circumstances here shown, by an absolute delivery of the property, by depositing it in the name and for the benefit of the consignee, but might rightfully preserve the same by arranging with Dunbar & Co. for its preservation, without subjecting itself to further liability as warehouseman. We think the effect of the arrangement was to constitute Dunbar & Co. warehousemen of appellant, who held the property for him, subject only to the lien for the carrier's charges.

Effect of
storage by
company.

We are of opinion that the trial court ruled correctly in refusing the various propositions submitted by appellant, and the judgment of the appellate court will accordingly be affirmed.

Judgment affirmed.

Liability of Carrier as Warehouseman.—See note 55 Am. & Eng. R. Cas 636.

When Liability as Carrier Ceases and Liability as Warehouseman Begins.—See *Kirk v. Chicago, St. Paul, Minneapolis & Omaha R. Co.*, *ante*, p. 203, note 205.

Lien of Connecting Carriers for Freight.—See *St. Louis, Iron Mountain & Southern R. Co. v. Lear (Ark.)*, 55 Am. & Eng. R. Cas. 414, and note 416.

GATES

v.

CHICAGO, BURLINGTON & QUINCY R. Co.

(Nebraska Supreme Court, Oct. 17, 1894.)

Duty of Carrier to Deliver Within Reasonable Time.—The duty of a common carrier of goods is not only to safely carry, but to deliver; and delivery must be made within a reasonable time, at the place and to the person to whom the goods were consigned,

Liability of Carrier for Delivery Without Surrender of Bill of Lading.—The delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier, unless when made, the consignee surrenders the bill of lading either made or indorsed to himself.

Nature of Bill of Lading—Assignability.—The bill of lading issued by a carrier to the owner or shipper is the symbol of ownership of the goods shipped, and, though not negotiable, is assignable.

Liability of Carrier to Consignor for Delivery of Goods to Third Person by Direction of Consignee and Agent of Consignor Without Surrender of Bill of Lading.—A railway company received from a connecting carrier at Omaha, Neb., a car of potatoes, consigned to W., at Bradshaw, Neb. W. was the agent of the owner of the potatoes. On arrival of the car of potatoes at Bradshaw, the railway company notified W. thereof, and at his direction delivered the potatoes to one K., to whom W., acting for the owner, had sold the potatoes. *Held*: (1) That the delivery to K. was, in effect, a delivery to W., the consignee; (2) that K. having failed to pay for the potatoes, the carrier was not liable to the owner thereof for their value, although the bill of lading for the goods was not surrendered to the carrier before delivery, as the instruction of W. to deliver to K. was, in effect, the owner's instruction, and it not appearing that the bill of lading for the goods had been assigned or indorsed to any one by the owner or shipper.

ERROR to Merrick county district court.

W. T. Thompson, for plaintiff in error.

A. W. Agee, for defendant in error.

RAGAN, C.—Leroy H. Gates sued the Chicago, Burlington & Quincy Railroad Company, hereinafter called the "railway company," in the district court of Merrick county.

Gates alleges as his cause of action against the railway company that on the 10th day of October, 1894, he delivered to it at Omaha, Neb., a car-load of potatoes, belonging to him,

Case stated. of the value of \$513; that the railway company, for a consideration, undertook to safely and securely carry the car of potatoes to Bradshaw, Neb., and there deliver them to one A. B. Warrell, who was then and there his (Gates') agent; that the railway company did not deliver

said car of potatoes to said Warrell, or to any person authorized to receive the same.

The answer of the railway company admitted that it received the car of potatoes, and contracted to carry them to Bradshaw, Neb., and there deliver them to Warrell, Gates' agent; and alleged that on their arrival at Bradshaw it delivered said car of potatoes to one Klock & Hankins, by order of said consignee, Warrell.

The reply of Gates denied the allegations of new matter in the answer.

It will thus be seen that the chief issue litigated in this case was whether Warrell instructed or authorized the railway company to deliver the car of potatoes to Klock & Hankins.

The jury found this issue in favor of the railway company, and from the judgment pronounced upon such finding Gates brings the case here for review.

1. The errors assigned and argued in the brief of counsel for the plaintiff in error relate to the giving to the jury by the court of three instructions at the request of the railway company: (1) "The law does not favor double agencies, and where a person employs or procures an agent of a railroad company to act for him in the buying or selling of merchandise of any kind such agent will, so far as such transaction is concerned, be deemed the agent alone of the person for whom he so acts in buying or selling of such merchandise, and not the agent of the railway company. In this case, if you believe from the evidence that B. L. Foster acted in the interest and on behalf of A. B. Warrell, and at his request, in securing from Klock & Hankins an order for the car-load of potatoes in question, and making the sale of such potatoes to Klock & Hankins, and in arranging for the assorting and weighing of the same, then you are instructed that in procuring such order and making such sale, and in conducting the transaction with Klock & Hankins concerning the sale and delivery of said potatoes, said Foster must be deemed the agent of said Warrell, and not of the said railroad company, and his action in delivering such potatoes to said Klock & Hankins will be binding on the plaintiff and said Warrell, and the defendant cannot be held liable for any of the acts of said Foster in delivering said potatoes to said Klock & Hankins."

The correctness of this instruction is assailed on three grounds: (1) It is said that there was no issue made, either in the pleadings or evidence in the case, as to whether Foster, who was the railway company's agent at Bradshaw, was the agent of Warrell, the consignee of the car of potatoes, and for that reason that the instruction is erroneous.

The evidence in the case tended to show that Warrell

had inquired of Foster whether the latter could find a purchaser for a car-load or two of potatoes in Bradshaw; that Foster made some inquiries in Bradshaw for persons desiring to purchase a car-load of potatoes, and that Klock & Hankins agreed to purchase a car-load of potatoes of a certain quality at a certain price; that the car-load of potatoes in controversy was shipped by Gates, or by Warrell acting for him, to Bradshaw, consigned to Warrell, to fill the order given by Klock & Hankins to Foster; that after the car of potatoes arrived in Bradshaw, Klock & Hankins inspected them, and refused to take them, because they were not of the quality they had agreed to buy; that communications immediately passed by wire between Warrell and Foster to the effect that Warrell instructed Foster to allow Klock & Hankins to take the potatoes, assort them, and do the best they could with them; and that, in pursuance of these instructions from Warrell, Foster delivered the car of potatoes to Klock & Hankins. In view of this evidence, we do not think that the instruction complained of is erroneous.

(2) The second objection urged to the instruction relates to the first sentence thereof. Counsel say: "The instruction is erroneous because it contains a partial or incomplete statement of an abstract proposition of law in this: that it contains the statement that 'where a person employs or procures an agent of a railroad company to act for him in the buying or selling of merchandise, such agent will, so far as such transaction is concerned, be deemed the agent of the person for whom he so acts in the buying and selling of such merchandise, and not the agent of the railroad company.' This rule is given to the jury as an inflexible, inelastic, invariable rule. It is given without any exceptions, qualifications, or limitations whatever, while it is not an invariable rule that such an agent will be deemed alone the agent of the one for whom he acts in the buying or selling of such merchandise, and especially is it not as applied to the case at bar."

We do not think that the first sentence of this instruction misstated the law applicable to the facts in this case. The court did not tell the jury that one might not be an agent for two principals. He did tell them—and perhaps unnecessarily—that the law does not favor double agencies. And he told them that where a person employs the agent of a railroad company to act for him in the buying and selling of merchandise, such agent, in such transaction, is deemed to be the agent of the person for whom he acts in buying and selling; and that was correct.

(3) The third objection urged to the instruction is that it

was couched in such language as to lead the jury to believe that there had been an actual sale of the potatoes in controversy to Klock & Hankins. We do not think that a fair criticism of the instruction.

2. The second error assigned relates to the giving by the court of instruction No. 2, as follows: "If you believe from a preponderance of the evidence that Klock & Hankins refused to accept the potatoes on their arrival on the ground that they were in a bad condition, and rotting, and that this fact was communicated to Warrell by Foster, and that Warrell thereupon directed Foster to have Klock & Hankins take the potatoes and assort them, and that Foster did, in pursuance of such direction, have Klock & Hankins take the potatoes from the car and assort them, then you are instructed that the defendant cannot be held liable for said potatoes, or for any difficulty or dispute which may have arisen between the plaintiff or Warrell on the one hand and Klock & Hankins on the other hand, and your verdict should be for the defendant." Counsel say that this instruction is erroneous, because it assumes that there was evidence in the record to show that Foster, the agent at Bradshaw, notified Warrell, Gates' agent, that Klock & Hankins had refused to accept the potatoes; and counsel insist that the record contains no such evidence. The evidence in the record is undisputed that Klock & Hankins did refuse to accept the potatoes, and that immediately afterwards communications by wire took place between Foster and Warrell with reference to the potatoes. Their testimony is as follows:

Foster's :

"Question. When you and Messrs. Klock & Hankins examined the potatoes in the car, state what they said about accepting the car-load of potatoes.

"Answer. They refused to accept them. I cannot quote their words, but they refused to accept them.

"Q. Then what was done in the matter between you and them?

"A. I tried to get them to take the car, and do the best they could with them, provided that Mr. Warrell was willing, and told them I would go in and talk with him; and then we all three went to the depot together.

"Q. What occurred after you went to the depot?

"A. Messrs. Klock & Hankins stopped at the window. I went into the office, and called Mr. Warrell on the wire at Central City, and the following conversation took place: I explained as fully as I could to him the condition of the potatoes, and Mr. Warrell said, 'Tell them to have the potatoes

assorted.' I turned around to the window, and told them the conversation, and whether it was one of them or myself that said, 'Have them assorted and do the best you can with them,' I don't remember, but I do distinctly remember that we three understood that that was the proposition to be made to Mr. Warrell on the wire in those words, and that Warrell assented to it.

"Q. Now please state, as near as you can, the language you used in submitting their proposition to Mr. Warrell and his reply.

"A. To Mr. Warrell: 'Shall they take the potatoes, and assort them, and do the best they can with them?' His reply was, 'Ay, ay,'—the customary assent in telegraphy."

Warrell's:

"Q. He wired you that the potatoes were rotten, and that they would not accept them?

"A. No, he did not.

"Q. Do you want this jury to understand that, without having any notice that Klock & Hankins refused to accept the potatoes, you wired the agent at Bradshaw that they would have to sort them, and weigh them?

"A. He did not notify me.

"Q. Do you mean to have the jury understand, at the time you wired the agent at Bradshaw that Klock & Hankins would have to sort and weigh the potatoes, that you did not understand at that time they had refused to accept the potatoes?

"A. I did not understand at that time.

"Q. Why was it that you was telling the agent at Bradshaw that they would have to sort and weigh the potatoes, which you supposed they had accepted, sir?

"A. He communicated with me, and it was just our talk over the wire.

"Q. Do you mean to say that it is customary for an agent of a railroad company, when potatoes or merchandise is in a bad condition, to arrange with the customer about any settlement of any dispute between the seller and the purchaser of those things, or about arriving at their condition, the quantity of the good potatoes?

"A. I did not consider there was anything to arrange at the time.

"Q. Then why did you say to Foster that they would have to sort and weigh the potatoes, if there was nothing to arrange?

"A. Simply because he asked me about it,—stated that there was some rotten potatoes in the car.

"Q. What did he ask about the potatoes?

"A. Simply told me there was some rotten potatoes in the car.

"Q. You just now stated he asked you about the potatoes, on account of rotten ones. What do you mean by that?

"A. I mean he called me up and told me there was some rotten potatoes in the car.

"Q. You mean to say that was after Klock & Hankins had accepted the potatoes?

"A. My understanding was that they had accepted the potatoes at that time."

We think that this evidence was sufficient to justify the court in submitting to the jury the question as to whether Foster notified Warrell in the communication had with him by wire that Klock & Hankins had refused to accept the potatoes.

3. "If you believe from all the evidence in this case that Warrell, the person to whom the potatoes were consigned, gave such instructions or directions to Foster concerning the assorting of the potatoes by Klock & Hankins as might reasonably be and was understood by Foster to constitute an order or direction to deliver the potatoes to Klock & Hankins, and, acting on such instructions, Foster did deliver the same to Klock & Hankins, that such delivery must be deemed a delivery to said Warrell, your verdict must be for the defendant."

Of this instruction counsel say: "This instruction is prejudicial and erroneous, for the reason that it in substance tells the jury that the defendant will be released from liability for a delivery to other than the consignee upon the slightest showing of care." We do not think that the plaintiff in error has any just cause of complaint by reason of the giving of this instruction.

It is undoubtedly true that the contract of a common carrier is not only to safely carry, but to deliver; and delivery must be made within a reasonable ^{Duty of carrier.} time, at the place and to the person to whom the goods are consigned.

"The whole question litigated in this case was whether the railway company delivered the goods to Klock & Hankins by order of the consignee, Warrell. The jury found that Warrell directed the railway company to deliver the goods to Klock & Hankins, and the evidence ^{Sufficiency of delivery.} supports that finding. Such delivery, then, was, in effect, a delivery to Warrell, the consignee. It is said by counsel that the delivery of this car of potatoes to Klock & Hankins was negligently made and unauthorized, because the bill of lading was not presented by them. Doubtless the rule

is that the delivery of goods by a common carrier to the consignee thereof is made at the peril of the carrier unless, when made, the consignee surrenders the bill of lading either made or indorsed to himself. *Furman v. Railway Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500; *Weyand v. Railway Co.*, 75 Iowa 573; 30 Am. & Eng. R. Cas. 102.

The reason for this rule is that the bill of lading is the symbol of ownership of the property, and, though not negotiable, is assignable. A shipper may deliver goods to a common carrier consigned to a purchaser of such goods, and at the same time make a draft or bill of exchange on the purchaser for the price of the goods shipped, and attach thereto the bill of lading, and his indorsement thereon for the goods. In such a case as this, and like cases, if the carrier deliver goods to the consignee thereof without the surrender by him of such bill of lading, such delivery would be made at the peril of the carrier; and, if the consignee failed to pay for the goods, the carrier would be liable to the shipper or owner for their value. *Furman v. Railway Co.*, 106 N. Y. 579, 32 Am. & Eng. R. Cas. 500.

But the case at bar does not fall within the rules stated above. Warrell represented the owner of the potatoes, and acted for him, and the evidence tends to show, and the jury have found, that the owner of the potatoes, or Warrell for him, contracted their delivery to Klock & Hankins. The railway company, then, has not violated its contract, and is not liable in this action. *Dobbins v. Railway Co.*, 56 Mich. 522; 21 Am. & Eng. R. Cas. 85.

The judgment of the district court is affirmed.

Sufficiency of Delivery of Goods.—See *Louisville & Nashville R. Co. v. Gilmer* (Ala.), 42 Am. & Eng. R. Cas. 450, and note 453.

Nature of Bills of Lading.—See *Jasper Trust Co. v. Kansas City, Memphis & Birmingham R. Co.*, *ante*, p. 153, and note, p. 162.

Delivery by Carrier—What Constitutes a Delivery such as will Entitle the Carrier to Freight—Placing Cars in Suitable Position for Unloading.—In *Columbus South. R. Co. v. Woolfolk* (Ga. Sept. 17, 1894), 20 S. E. Rep. 119, it was held that where commodities, such as watermelons, are shipped in full car-loads by railroad from one city to another, the freight is due, in the absence of an express contract fixing a different time, when the cars reach the usual place of storing such cars in the city of destination, and the consignee is notified of their arrival and of the company's readiness to deliver. This is so although it may be necessary, before actual delivery can be made, to switch them out, and place them upon particular tracks of the company, designated as "team tracks." The consignee has no right to postpone the payment of freight until they are placed on those tracks, but he can insist, after paying the freight, that they shall be placed there immediately, or as soon as it can be done with full diligence in the ordinary course of business.

Duty of Consignee to Sell Shipment in Carrier's Possession.—In *Columbus South. R. Co. v. Woolfolk* (Ga. Sept. 17, 1894), 20 S. E. Rep. 119, it was held, that if a consignee is in no default in failing to pay freight, and there was no tender of delivery without payment, he is under no duty to sell the consigned goods (in this case melons) while they are in the possession of the carrier.

Delivery to Carrier as Delivery to Purchaser from Consignor.—In *Havens v. Grand Island, L. & F. Co.* 41 Neb. 153, it was held that the general rule is that the delivery of goods to a carrier consigned to the purchaser thereof is a delivery to such purchaser, and that the title of the goods so delivered to the carrier at once vests in the purchaser; but this rule is not a universal one, and whether applicable in any case depends upon the facts, circumstances, and contract between the seller and the purchaser, in the case.

LONDON & LANCASHIRE FIRE INSURANCE CO.

v.

ROME, WATERTOWN & OGDENSBURG R. CO.

(144 *New York*, 200.)

Liability of Carrier for Loss of Goods Caused by Delay in Transportation.—Where goods are delivered to a railroad company for immediate shipment, and are accepted by the company and placed in its freight-house, and the shipment is delayed because of the inability of the company to furnish cars, and while in the freight-house the goods are consumed by fire, the company is liable, notwithstanding that the duty to load the goods on the cars rested upon the shippers. *Explaining and distinguishing Wilson v. Atlanta & C. A. L. R. Co.*, 82 Ga. 386, 40 Am. & Eng. R. Cas. 25.

APPEAL from general term, fourth department.

D. G. Griffin, for appellant.

A. H. Sawyer, for respondent.

EARL, J.—This action is brought to recover damages against the defendant for the destruction by fire of a large quantity of hay, alleged to have been delivered to it as a common carrier for transportation. It is admitted that if, at the time of the destruction of the hay, it was in the possession of the defendant as a common carrier, it is liable in this action; and the sole question for our determination is whether the hay had been so delivered to the defendant, and placed in its custody, as to make it liable as a common carrier. The plaintiff sues as assignee of the shippers, and stands in their place. Case stated.

The hay, at the time of its destruction, was in the defend-

ant's freight-house at Cape Vincent, and had been placed there by the plaintiff's assignors, with the consent and under the direction of the defendant's freight agent at that place.

Liability of carrier. The hay was delivered in bales, and it was the usage and the regulation of the defendant, known and assented to by the shippers, that they were to load it into the defendant's cars. The claim of the defendant is that its responsibility as a common carrier had not attached to it at the time of the fire, for the sole reason that the duty of loading the hay into its cars rested upon the shippers, and that its duty as a common carrier could not attach until the hay was thus loaded.

There is no doubt that it is the duty, generally, of a railroad company, to load the freight delivered to it for transportation into its cars, and that it cannot generally devolve this duty by any regulation upon the shipper; and that it cannot legally, as a condition of transportation generally, exact from the shippers a contract to place the freight into its cars. But we know from our own observation that, as to hay, lumber, saw-logs, live animals, and other bulky freight, the shippers usually load the freight into the cars. We need not however, now decide whether a railroad company can, as to such bulky freight, make a regulation that the shipper shall load it, because here the shipper acquiesced in the regulation, and undertook the duty of loading.

But we do not think that the fact that the shipper undertakes to load the freight into the cars necessarily postpones the time when the railroad company takes on the character of a common carrier. The rule as to the responsibility of the carrier is laid down in varying phraseology, in a variety of cases, as follows: To render a common carrier liable for goods to be carried by him, the fact that the goods were actually delivered to him, or to some person authorized to act in his behalf, must be established. His liability attaches only from the time he accepts the goods to be carried. To complete the delivery of goods to the carrier, it is essential that the property be placed in a position to be cared for, and under the control of the carrier or his agent, with his knowledge and consent. The liability of a railroad company as common carrier of goods delivered to it attaches only when the duty of immediate transportation arises. So long as the shipment is delayed for further orders as to destination of the goods, or for the convenience of the owners, the liability of the company is that of warehousemen. The liability of a common carrier for goods received by him begins as soon as they are delivered to him, his agents or servants, at the place appointed or provided for their reception, when they are in a fit and

proper condition, and ready for immediate transportation. If a common carrier receives goods into his own warehouse, for the accommodation of himself and his customers, so that the deposit there is a mere accessory to the carriage, and for the purpose of facilitating it, his liability as a carrier will commence with the receipt of the goods.

But, on the contrary, if the goods when so deposited are not ready for immediate transportation, and the carrier cannot make arrangements for their carriage to the place of destination until something further is done, or some further direction is given or communication made concerning them, by the owner or consignor, the deposit must be considered to be in the meantime for his convenience and accommodation, and the receiver, until some change takes place, will be responsible only as a warehouseman. The party bringing the goods must first do whatever is essential to enable the carrier to commence, or to make needful preparations for commencing, the service required of him, before he can be made liable or subjected to responsibility in that capacity. Where goods are delivered to a common carrier to await further orders from the shipper before shipment, the former while they are in his custody is only liable as warehouseman, and his only responsibility as carrier is where goods are delivered to and accepted by him in the usual course of business for immediate transportation. The duties and the obligations of the common carrier with respect to the goods commence with their delivery to him, and this delivery must be complete, so as to put upon him the exclusive duty of seeing to their safety. The law will not divide the duty or the obligation between the carrier and the owner of the goods. It must rest entirely upon the one or the other, and until it has become imposed upon the carrier by a delivery and acceptance he cannot be held responsible for them. The entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely on delivery carries with it a promise to keep safely before the goods are put *in itinere*. *Judson v. Railroad Co.*, 4 Allen 520; *Barron v. Eldridge*, 100 Mass. 455; *Grosvenor v. Railroad Co.*, 39 N. Y. 34; *O'Neill v. Railroad Co.*, 60 N. Y. 138; *Redf. Carr.* 80; *Ang. Carr.* § 129.

In *Wilson v. Railway Co.*, 82 Ga. 386, 40 Am. & Eng. R. Cas. 25, a case somewhat relied on by defendant's counsel, a quantity of wood was piled along the line of the defendant's railroad, for the purpose of having it transported thereon, and the shipper was to place the wood in the defendant's cars.

There the action was brought to recover damages on account of unreasonable delay in transporting some of the wood, and also for the loss of some portion thereof. The plaintiff failed to recover on the ground that, upon all the facts in that case, the wood had not been delivered to and accepted by the railroad company for immediate shipment; and no principle was laid down in that case which can be invoked for the protection of the defendant in this. Here the hay was delivered to the defendant for immediate shipment, and it was accepted by it, and placed in its freight-house. It was not stored for the accommodation and convenience of the shippers. They were there ready, willing, and anxious to put the hay into the cars as fast as the defendant would furnish them. There was no delay whatever by the request of the shippers, on account of any act or omission on their part. Whatever delay there was in the shipment was due exclusively to the omission of the defendant to promptly furnish cars for the transportation.

Although a railroad company may not be able promptly to transport freight delivered to it, and there may be considerable delay, and even long storage, of the freight, until cars can be furnished, nevertheless it takes on the character of a common carrier the moment the property is delivered and received by it for immediate transportation. It can make no difference whether the railroad company was to place this hay in its cars or whether the shippers were to do that work. Whoever was to load the hay into the cars, it was delivered and received for immediate shipment; not for storage, not to be kept for the shippers, and not subject to their control, and it was not in their custody. It was simply left in the freight-house of the railroad company until it could furnish cars for its transportation. It was there for immediate shipment, with nothing more to be done than to place it in the cars; and whether that work was to be done by the railroad company or by the shippers can make no difference in reason or principle.

If, however, in such a case, the delay of the shipment is caused by some fault of the shippers,—if they are not ready to place the freight in the cars when they are furnished, and thus shipment is delayed until the property, without the fault of the carrier, is destroyed,—the loss would then fall upon the shippers, because it was due to their fault. In this case, at the time of the fire, the property was stored for the convenience of the carrier, and not for the convenience of the shippers, and its destruction was due to its default, and in no way to any default on their part.

We therefore see no reason to doubt that this discovery was right, and that the judgment should be affirmed with costs.

All concur (PECKHAM and BARTLETT, JJ., in result), except O'BRIEN, J., taking no part.

Judgment affirmed.

Liability of Carrier for Delay in Transportation.—See *St. Clair v. Chicago, Burlington & Quincy R. Co.* (Iowa), 40 Am. & Eng. R. Cas. 414, and note 417.

COLLINS.

v.

ALABAMA GREAT SOUTHERN R. CO.

(Alabama Supreme Court, Aug. 10, 1894.)

Nature of Carriers' Liability as to Goods Carried to their Destination and after Notice to the Consignee of their Arrival.—Independent of statute when a railroad company receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him reasonable opportunity to remove them, its duties and obligations as a common carrier are at an end, and if the goods are left in its custody, its liability for a subsequent loss or damage is that of warehouseman only, and in this relation, it is bound only to common care and diligence.

Sufficiency of Notice to Consignee of Arrival of Goods as Required by Statute.—Under a statute (Code § 1180) requiring notice by carriers to the consignees of goods of the arrival thereof either personally or by mail, proof of the mailing of a postal card containing such notice is sufficient to show compliance with the statute, and it is not necessary that the card itself should be produced.

Same—Who are Consignees—Direction of notice to Designated Persons.—Where a person consigns goods to himself with directions on the bill of lading that notice of the arrival of the goods at their destination shall be given to designated persons, the persons so designated become virtually the consignees, and notice of the arrival given to them is sufficient under a statute requiring such notice to be given to the consignees.

Storage by Company of Powder in Warehouse—Loss of Consigned Goods by Explosion Caused by Incendiarism—Liability of Company.—The storage of powder in the warehouse of a railroad company is not of itself evidence of such negligence as will authorize a recovery by persons whose goods in the same warehouse are destroyed by an explosion of the powder caused by incendiarism.

Liability of Company for Loss of Consigned Goods in Warehouse by Incendiarism of Employee.—A railroad company is not liable for the destruction of goods, which it has carried and placed in its warehouse, by an explosion of powder caused by the wrongful act of one of its employés in setting fire to the warehouse.

APPEAL from Jefferson county circuit court.

The 1st, 2d, 3d, and 5th counts of the complaint sought a

recovery of the defendant as a common carrier, and the remaining counts, the 4th and 6th, undertook to hold the de-

Case stated. defendant responsible as a warehouseman. The defendant pleaded the general issue to all of the counts, and to the 4th and 6th counts pleaded the statute of limitations of one year.

The evidence introduced upon the trial of the cause, as is shown by the bill of exceptions, is without conflict, and is substantially as follows: On July 7, 1891, the plaintiff, James R. Collins shipped from New York to Birmingham, Ala., a bale of burlaps, consigned to himself, which was valued at \$168.58

On the bill of lading there was an indorsement which required the defendant to notify Stollenwerck & Co. in the city of Birmingham of the arrival of the goods.

On July 17, 1891, the plaintiff again shipped, consigned to his own order, from New York to Birmingham, four bales of burlaps valued at \$160.

This bill of lading required that one T. H. Spencer should be notified of the arrival of the goods in Birmingham, Ala.

These bills of lading were issued in the state of New York, and were like other contracts of that kind.

The goods which were shipped on July 7, 1891, arrived in Birmingham July 15th, and those shipped on July 17th arrived at Birmingham on the 24th day of July, 1891. Stollenwerck & Co. were notified of the arrival of the goods, and it was shown that a postal card directed to "T. H. Spencer, Birmingham, Alabama," was placed in the post-office at Birmingham by one of the employes of the defendant.

The goods remained in the freight depot of the defendant at Birmingham until the night of July 30, 1891, on which night the said freight depot was consumed by fire.

At the time of said fire there was stored in the said freight depot a large quantity of powder, which exploded and destroyed the goods of the plaintiff which were at that time in the said depot.

The depot building in which these goods were kept was described in detail, and it was shown that said depot was built of corrugated iron and covered with tin, and that the railroad company kept a competent watchman there at night for the purpose of guarding the depot.

There was no positive evidence introduced showing how the fire occurred, further than a suspicion, which did not amount to proof, that one Ellis, who was an employe of the Alabama Great Southern Railroad Company, and who was behind with the company in his accounts, had purposely set fire to the house for the purpose of hiding his default.

The evidence showed that the powder which exploded in the depot that night had been shipped to Birmingham over the line of the Alabama Great Southern Railroad Company to J. B. Morson, and that Morson had been duly notified of the arrival of the powder on the morning of the 30th July; that the powder arrived on the day before the explosion; that is to say, on the 29th day of July; the fire and explosion occurring on the night of the 30th.

The evidence further showed that on the same night of the explosion, and a little while prior thereto, the watchman, who was on duty at the depot, made an examination around the building, and found no fire in the building. The evidence showed that at the time of the explosion the watchman was not at the building, but had gone, or had started to the Union Depot for the purpose of getting a cup of coffee or some lunch.

The objections to the evidence, which are ruled upon by this court on the present appeal, are sufficiently stated in the opinion. Upon the hearing of all the evidence the court, at the request of the defendant, gave the general affirmative charge in its behalf, and to the giving of this charge the plaintiff duly excepted.

The plaintiff brings this appeal, and assigns as error the rulings of the trial court upon the evidence, and the giving of the general affirmative charge for the defendant.

Lane & White, for appellant.

A. G. Smith, for appellee.

HARALSON, J.—1. The first assignment of error is that the court below erred in overruling plaintiff's demurrer to defendant's fourth plea; but the record fails to disclose what that demurrer was, and we cannot, therefore, consider this assignment.

2. According to the decisions of this court, without reference to any statute on the subject, the liability of a railroad company as a common carrier of goods transported over its line, does not cease on the arrival of the goods at their destination, and their deposit there in a warehouse, but continues until the lapse of a reasonable time for the removal of the goods by the consignee, and its liability as a warehouseman does not begin until its liability as a common carrier has ceased. *Railroad Co. v. Ludden*, 89 Ala. 613, 42 Am. & Eng. R. Cas. 404; *Railroad Co. v. Ledbetter*, 92 Ala. 326.

Liability of
company.

As a general rule, the undertaking of a common carrier to transport goods to a particular destination includes the obligation of a safe delivery of them to the consignee. Railroad

Co. v. Wood, 66 Ala. 167. The decisions of this court, however, in the case of railroads have established the rule to be, that when a railroad company receives goods for transportation, safely carries them to their destination, informs the consignee of their arrival, and affords him reasonable opportunity to remove them, its duty and obligation as a common carrier are at an end; and if the goods are left in its custody its liability for a subsequent loss or damage is that of a warehouseman only. In that relation it is bound only to common care and diligence. *Kennedy v. Railroad Co.*, 74 Ala. 430; 21 Am. & Eng. R. Cas. 145; *Railroad Co. v. Prewitt*, 46 Ala. 63; *Railroad Co. v. Kidd*, 35 Ala. 209; *Hutch. Carr.* § 350.

3. By section 1180 of the Code it is provided that if the place of destination of freight is a city or town having 2000 inhabitants or more, and a daily mail, the carrier is not relieved of the responsibility of a common carrier by reason of a deposit or storage of freight in a depot or warehouse, unless, within 24 hours after the arrival of such freight, notice thereof is given to the consignee personally or through the mail. This statute applies to all carriers, including railroads, and prescribes the notice to be given, and how it may be given, necessary to relieve them of the responsibility, in the cities and towns specified. In such places, if notice thereof, either personal or by mail, is given, within 24 hours after the arrival of the goods transported, the liability of a common carrier ceases, when the goods are thereafter placed in a depot or warehouse, and that of a warehouseman begins, on such a deposit.

4. In this case, the proof shows, without conflict, that Stollenwerck & Co., within 24 hours after the arrival of the bale of goods shipped to them, received notice by mail from defendant of their arrival. In order to show that T. H. Spencer,—the party designated to receive the notice of the arrival of the other bales of goods,—was duly notified of their arrival, the defendant company sought to prove against the objection of plaintiff, that within 24 hours after their arrival, it gave said Spencer such notice by the means of a postal card, containing such notification, addressed and mailed to him at Birmingham. The precise objection to this evidence did not relate to the fact or the time of the mailing, but that “the postal card itself was the best evidence.” The objection was not well taken. The postal card was itself a notice, given as directed by the statute, and like a notice to quit or notice of the dishonor of a bill of exchange, notice to produce it, was not necessary. Mailing the notice was what the statute required, and the fact neces-

Statutory requirement—
Notice of arrival of goods.

Proof of notice.

sary to be proved. 1 Greenl. Ev. § 561; 1 Whart. Ev. 162; *Watson v. State*, 63 Ala. 21.

5. It is objected, in this connection, that Stollenwerck & Co. and Spencer were not proper parties to receive this notice. The consignor lived in New York, and the goods having been consigned to himself, with directions on the bills of lading, given by him, that notice of their arrival at Birmingham should be given to these persons, thus designated, he constituted them, thereby, his agents to be notified of the arrival of the goods, and to receive them from the defendant. They were virtually the consignees, and the delivery of the goods might have been lawfully made to them. Spencer testified that he was a broker, and sold goods for plaintiff on commission, and that these goods were sent to him as a broker to be disposed of for plaintiff on commission. *Pepper v. George*, 51 Ala. 190; *Reid v. Bank*, 70 Ala. 211. Who are "consignees."

After the arrival of the goods, and notice of their arrival had been given to the parties thus designated to receive such notices, and to receive the goods themselves, they remained in the warehouse of defendant,—one bale of them from the 15th, and the other from the 24th of July, until the night of the 30th of that month, when they were destroyed by fire caused by an explosion of gunpowder stored in the warehouse. This was more than reasonable time within which to remove them. *Railroad Co. v. Ludden*, *supra*. The goods, therefore, were held by the defendant, at the time of their destruction, as a warehouseman, with the liabilities as such, only, its responsibilities as a common carrier having terminated.

6. We will not review the evidence tending to show the care and diligence exercised by the defendant, both in the structure of its warehouse, the materials out of which it was built, and the manner in which the same was guarded and kept to prevent accidents and to preserve the property stored from loss and destruction. These will be set out in the report of the cause. It is sufficient to say, that the defendant appears to have exercised all reasonable and proper care to preserve the property, and that the accident by which it was destroyed, arose from no negligence on its part. The fact that the defendant had in its warehouse at the time 1200 pounds of powder, is not, of itself, such evidence of negligence as entitles the plaintiff to recover. While it may be said that the keeping of large quantities of explosive material in a building in a populous town or city may be a nuisance, yet, the fact whether it is such or not, must depend on the locality, quantity of the Liability of company—
Storage of powder.

material stored, and the circumstances. Negligence in keeping it, or in the manner of its keeping, is requisite to impose a liability to answer in damages for injuries caused by an accidental explosion or fire, which it is incumbent on the party offering to prove. *Cook v. Anderson*, 85 Ala. 105; *Wood, Nuis.* § 149.

The defendant was a common carrier of such and all other commercial materials. It is not shown that there was any city ordinance against storing the powder in its depot, for the purpose of delivering it to its consignee. It arrived on the 29th, the day before the explosion, and the consignee was duly notified on the morning of the 30th. of July, the day of the explosion, of its arrival; and instead of being negligent, the evidence shows the defendant was very careful to preserve it against accident in a house built of iron and covered with tin and carefully guarded. There was no evidence to show how the explosion occurred, further than that there was some suspicious facts tending to show that one Ellis, an employé of the defendant, who was behind in his accounts, may have set fire to the building, for the purpose of hiding his default. But, there was no evidence tending to show, if Ellis did set fire to it, that it was a negligent act of his, done while in the performance of his duty. If he did it at all, it was his own tortious, wicked act, done outside the line of his employment, in which the defendant did not participate, or afterwards in any manner ratify, and for which it is not, in any wise, responsible. It is well settled that if an agent go beyond the range of his employment or duties, and of his own will do an unlawful act, injurious to another, he, and not his employer, is liable. *Gilliam v. Railroad Co.*, 70 Ala. 269; 15 Am. & Eng. R. Cas. 138; *Lilley v. Fletcher*, 81 Ala. 234.

It is unnecessary to notice the other errors assigned, as to the introduction of evidence.

There was no error in giving the general charge in favor of defendant.

Affirmed.

When Liability as Carrier Terminates and Liability as Warehouseman Begins.--See *Kirk v. Chicago, St. Paul, Minneapolis & Omaha R. Co.* ante, 203, and note, 205.

PALMER

v.

ATCHISON, TOPEKA & SANTA FE R. Co.

(101 *California*, 187.)

Action for Failure of Carrier to Transport and Deliver Goods Within Reasonable Time—Sufficiency of Complaint.—In an action against a carrier to recover for alleged delay in the transportation and delivery of goods, a complaint is sufficient as against a general demurrer, which alleges generally that such transportation and delivery was not within a reasonable time, although it does not expressly allege what time would be deemed reasonable.

Same—Delay by Unprecedented Snow-storms on Connecting Line—Measure of Liability.—The measure of liability of a carrier of merchandise for delay in its transportation and delivery is that caused by the want of ordinary care and prudence on its part (Civ. Code, § 2196), and hence where delays charged against a railroad company occurred by reason of a snow blockade upon another road one thousand miles distant, in a region where storms of the nature and duration of the one in question were unknown up to that time, it cannot be said that the company was responsible for such delay where it appears that every reasonable effort was made after receipt of the goods, and before knowledge of the blockade, to forward them to their destination.

Same—Limitation of Liability Beyond Terminus of Line—Presumption as to Law of Other State.—The company cannot be held liable where, by its receipt of the goods in another state, it expressly limits its liability to transportation over its own road, and safely delivers the goods received by it at the terminus of its line to a connecting road, in the absence of any proof that the law of such other state differs from the law of this state on the subject, and in view of section 2201 of the Civil Code, allowing carriers to stipulate for the cessation of their liability for goods accepted for shipment beyond their usual route, and delivered at the end thereof in that direction to some other carrier carrying to the place of the address or connected with those who do thus carry.

APPEAL from San Diego county superior court.

Hunsaker, Britt & Goodrich and *A. Brunson*, for appellant.

Luce & McDonald and *Dodson & Ecker*, for respondent.

SEARLS, C.—This action was brought to recover from defendant, a corporation, and a common carrier, damages sustained by plaintiff by reason of the alleged failure of defendant to transport from Kansas City, Mo., to San Diego, Cal., and deliver to the plaintiff within a reasonable time, five car-loads of furniture. Plaintiff had a verdict for \$1000, upon which judgment was entered. De-

Case stated.

fendant appeals from the judgment and from an order refusing a new trial.

Plaintiff's recovery was founded upon the second count of the complaint. To this a demurrer was interposed, which appellant contends should have been sustained, but which was overruled.

The portion of the complaint to which objection is taken may be epitomized as follows :

Sufficiency of complaint. On the 24th day of December, 1887, the defendant, for a valuable consideration, undertook to receive and carry over its road from Kansas City to San Diego, and deliver to plaintiff within a reasonable time, five car-loads of furniture, etc.

That defendant received the same at the date mentioned for the purpose of transportation aforesaid, but did not, as it undertook to do, transport said goods to San Diego within a reasonable time, and did not deliver the same to plaintiff until on or about February 15, 1888.

The objection goes to the point that the complaint should have specified what was a reasonable time for the transportation of the goods between the two points, and failing to do so, was open to an attack upon the ground that it did not state facts sufficient to constitute a cause of action. In the absence of a special demurrer directed to this point, we think the general allegation of a failure to transport and deliver within a reasonable time was sufficient.

The form used by the pleader is substantially that laid down by Chitty as sufficient in actions *ex contractu*, in his work on Pleading. 2 Chit. Pl. p. 103.

It was admitted at the trial that the Atchison, Topeka & Santa Fe Railroad terminated at Albuquerque, N. M., and that the Atlantic & Pacific ran from Albuquerque into California, and connected at Barstow with the California Southern, which extended to San Diego—the three roads thus forming a through line from Kansas City, Mo., to San Diego, Cal., each road being operated by a different company.

The five car-loads of goods were delivered to defendant at Kansas City, directed to the plaintiff at San Diego, as follows :

2 cars December 24, 1887.

1 car December 27, 1887.

2 cars January, 1888.

The company furnished to the shipper bills of lading, which, so far as important here, were as follows :

“ 12-24-1887.

“ Atchison, Topeka and Santa Fe R. R. Co.

“ K. C. Station will receive the under-noted property, and transport it over the road, and deliver to consignee, or the next

company of carriers (if the same is going beyond its line of road), for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers; the company being liable as warehousemen only. Abernathy Fur. Co., Shipper, to Oscar Palmer, Consignee, San Diego, California," etc. Then follow usual description and number of car, signed, "Wm. Carroll for the Co." The bills of lading for the several cars were the same, except as to dates, numbers, etc.

The evidence shows without substantial contradiction that on the 5th day of January, 1888, a snow-storm of unprecedented severity commenced over the mountain region traversed by the Atlantic & Pacific Railroad, which lasted for a period of ten days to two weeks, blocking the road and practically stopping the transportation of freight, during which time some 683 loaded cars accumulated at Albuquerque and in its vicinity, with the result that when the road was again open it was, say, 30 days before the accumulated freight was finally passed over the road.

The Atlantic & Pacific Company seems to have made every effort to open its road. It rented some 38 locomotives, in addition to 46 owned by it, most of which, for many days, were engaged in an effort to open the road, and no labor or expense was spared in the work. The yards and side-tracks of the Atlantic & Pacific road became filled with cars until they could receive no more, when they notified the defendant to hold all cars at Albuquerque until they were able to receive and forward them. This unexpected blockade on the Atlantic & Pacific is shown to have been the sole cause of the delay of plaintiff's goods.

There is no showing of delay upon defendant's road, except as the cars were held by it at and near its western terminus because the Atlantic & Pacific could not receive and forward them.

All the goods were shipped prior to the storm except those in the two cars shipped January 7th; and, when the storm was over, the cars were sent forward from Albuquerque in the order received.

It must be conceded that a railroad company receiving freight for transportation over its own and connecting lines, which, by reason of some fact known to it and unknown to the shipper, is liable to detention beyond the usual time occupied in transit, should inform the shipper of such fact, in order that the latter may exercise his judgment as to the propriety of making the ship-

Liability of
company.

ment. There is not, however, any evidence in the record tending to show that the defendant had, at the date of the last shipment, on January 7th, any knowledge of the storm which then, and since the 5th, had been prevailing on the mountain division of the Atlantic & Pacific.

Very slight evidence would be sufficient notice of such a fact had the storm been near at hand, or on its own road, but when we consider that it was upon another road, over 1000 miles away, and in a region where storms of the nature and duration of the one in question were unknown up to that time, we cannot see how, in the absence of evidence, defendant can be presumed to have known that an unusual storm had set in, any more than it would be presumed to know the length of time it would continue, or the great depth to which the snow would fall.

In passing judgment on this question we are not at liberty to view it in the light of present known facts, but must confine ourselves to the facts apparent when defendant received the freight. We must bear in mind that the blockade occurred in a latitude and at a point where a like storm was not to be expected, and where, if snow fell, it might be expected to be of short duration; and that freight received at Kansas City, and requiring several days to reach the point in question, might reasonably be expected to meet an open road by the time it reached the point of difficulty.

Under such circumstances, had the proofs shown knowledge of the storm on the part of defendant at the date of receiving the goods, it cannot be said as a matter of law that a failure to notify the shipper was negligence, but only that it was such evidence of negligence as should be submitted to the jury to determine whether there was in fact negligence on the part of the defendant.

Respondent claims that defendant was aware, when it received the goods, that there was a great blockade of freight on its different connecting lines, to haul which they were unprepared, and that this unusual press of business, coupled with inadequacy of rolling-stock, was the cause of the delay; that defendant had notice of these facts, and should have notified the consignor plaintiff, and, failing so to do, it is liable.

The testimony on this point is to the effect that it was the busy season of the year for traffic and travel to southern California; that a large volume of freight was moving westward over the road.

The testimony shows, however, that "the principal reason for the delay was on account of the snow-storm, for, had it not been for the snow-storm, the delay would not have oc-

curred. The rush of freight or the rapid increase of freight over usual traffic did not cause the delay for this reason. * * * The snow-storm alone was the primary cause of the delay, of the accumulation of freight which I have described. By primary cause I mean the line was open for business before the snow-storm, and was running regularly, and then, when the snow-storm came, that it took such a large amount of motor power to open up the line that, while we were clearing it, no freight or passenger traffic could be moved over the mountain division, and in the meantime it allowed freight to greatly accumulate at other points."

The same witness, after describing the storm and the efforts to keep the Atlantic & Pacific open, says: "I do not see that the delay could have been avoided. If that snow-storm had not happened Mr. Palmer's cars would have gone through all right. The line was running on good time previous to the storm."

Thus much is quoted as a sample of the evidence on the part of defendant, which, we think, establishes the fact without substantial conflict that the delay complained of occurred upon the Atlantic & Pacific road, and was occasioned by the storm upon the mountain division of that road, and that the operators of such road used every reasonable effort to keep the line open.

"A common carrier is liable for delay only when it is caused by his want of ordinary care and diligence." Civ. Code, § 2196. "Accordingly it has been held that when the carriers' canal-boat was run into by a scow, which made it necessary for him to stop for repairs, the delay thereby occasioned was excusable (*Parsons v. Hardy*, 14 Wend. 215); or when he was delayed by deep snow, which made the road temporarily impassable (*Ballentine v. Railroad Co.*, 40 Mo. 491); or the washing away of a bridge over a stream by a freshet, which it was necessary for the carrier to cross (*Railroad Co. v. Ragsdale*, 46 Miss. 458). * * * So a railroad company will be excusable for delay in the delivery of goods, when, having running powers upon another road, it is obstructed by the negligence of the latter." (*Livingston v. Railroad Co.*, 5 Hun, 562; *Hutch. Carr.* § 331.)

The measure of liability of a common carrier of merchandise in case of its loss or injury is very different from that imposed upon him for delay in transporting and delivering such merchandise. In the former case he is liable for its value in any event, except from some inherent weakness, defect, or vice, or from the spontaneous action of the property itself, or the act of a public enemy, or the act of the law, or "any irresistible superhuman cause"

Measure of
liability.

(Civ. Code, § 2194); while for delay he is, as before quoted, only liable for a want of "ordinary care and diligence."

Railroad companies may bind themselves by contract not only to convey over their own, but over connecting, lines, and may bind themselves to deliver goods within a given time. (*Pereira v. Railroad Co.*, 66 Cal. 92, 18 Am. & Eng. R. Cas. 565); but, in the absence of such contract, express or implied, they are only bound to transport them to the termini of their own line, and to deliver them to the connecting carrier for transportation to their final destination; and that within a reasonable time (Hutch. Carr. §§ 145, 159b, 154, 102, 103a, and cases cited).

The English courts hold that where goods are delivered to a railway company, to be transported beyond the terminus of its line by a connecting company, the presumption is that the company receiving them is liable for loss, injury, or delay occurring beyond its own line. *Muschamp v. Railway Co.*, 8 Mees. & W. 421, is the leading English case upon this question.

The rule as enunciated in that case was that when the carrier accepts for carriage goods directed to a destination beyond its own route it assumes, by the very act of acceptance, in the absence of any express contract on the subject, the obligation to transport them to the place to which they may be directed.

This rule has been steadily adhered to in the English courts. On the other hand, the majority of the American courts have held that, in the absence of any other contract than that implied by an acceptance of the goods for carriage, the obligation of the carrier extends only to the ends of his route, and a delivery there to the next connecting carrier to further or complete the carriage; and that, in order to be bound, there must be a positive agreement, express or implied, extending the liability. *Nutting v. Railroad Co.*, 1 Gray, 502; *Gray v. Jackson*, 51 N. H. 9, and cases cited. From the review of the cases in *Gray v. Jackson* it will be seen that the rule is by no means uniform in this country. Our Civil Code has, however, settled the question in this state. Section 2201 is as follows: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier carrying to the place of address, or connected with those who thus carry, and his liability ceases upon making such delivery."

That there was no stipulation on the part of the defendant to be responsible beyond the terminus of its line, and that it expressly limited its liability to its own road, is attested by

its receipt for the goods, which in such cases amounts to a bill of lading, in which, as it might do, it expressly limited its liability to transportation over its own road. (*Pollard v. Vinton*, 105 U. S. 7; *Hutch. Car.* §§ 121, 122; *Civil Code*, § 2176.)

The law of the place where the contract is made governs in determining the liability of the carrier, unless the parties at the time of making it had some other law in view. (*Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681. *In re Missouri Steamship Co.*, 42 Ch. Div. 321; *Hazel v. Railway Co.*, 82 Iowa, 477, 49 Am. & Eng. R. Cas. 76; *Fonseca v. Steamship Co.*, 153 Mass. 553.)

There are exceptions to this rule, founded upon the supposed intention of the parties, gathered from circumstances surrounding the transaction. *Ryan v. Railroad Co.*, 65 Tex. 13; 23 Am. & Eng. R. Cas. 703.

Thus much is said to indicate that the question is not overlooked. The cause, so far as can be determined from the record, was tried upon the theory that the law of California is applicable. There is no suggestion that the law of Missouri, where the contract for transportation was made, was put in evidence.

Under such circumstances, we are not at liberty to assume as a fact that the state of Missouri has a special statute on the subject, but must presume as a question of law that the law of that state is the same as our own. *Norris v. Harris*, 15 Cal. 226; *Hill v. Grigsby*, 32 Cal. 56; *Taylor v. Shew*, 39 Cal. 540; *Brown v. Gas-light Co.*, 58 Cal. 426; *Marsters v. Lash*, 61 Cal. 622; *Shumway v. Leakey*, 67 Cal. 458.

Judged by our own statute, and by the lawful limitation which defendant might and did embrace in its bill of lading, it was bound to transport to Albuquerque, and deliver to the Atlantic & Pacific, connecting road, within a reasonable time, plaintiff's goods.

This it is shown to have done, except as it was prevented without fault of its own by the inability of the Atlantic & Pacific to receive them when they reached the terminus of defendant's line. That the delay was caused upon the Atlantic & Pacific road by act of God, or "irresistible superhuman cause," is, we think, clearly established. The scintilla of evidence to the contrary is not sufficient to establish a substantial conflict; but, waiving this question, the negligence or want of it, on the part of the connecting road, is not one for which this defendant, under its contract and the statute, can be held liable.

It follows that the evidence is insufficient to justify the verdict, and it is against law.

The judgment and order appealed from should be reversed, and a new trial ordered.

HAYNES, C., and VANCLIEF, C., concurred:

PER CURIAM.—For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed, and a new trial ordered.

Limitation of Liability to Carrier's Own Line.—See *Jones v. Cincinnati, Selma & Mobile R. Co.* (Ala.), 45 Am. & Eng. R. Cas. 321, and note 323.

Connecting Lines—Rights and Liabilities.—See *St. Louis, Arkansas & Texas R. Co. v. Neel* (Ark.), 55 Am. & Eng. R. Cas. 428, and note 434; *Jennings v. Grand Trunk R. Co., of Canada* (N. Y.), 49 Am. & Eng. R. Cas. 98, and note 108.

Liability of Initial Carrier.—In *Alabama & V. R. Co. v. Searles*, 71 Miss. 744, it was held that a railroad company is bound to safely take care of goods delivered to it for transportation so long as they are in its custody and in course of transportation, and as to the cars supplied by it, this duty continues throughout the journey unless the condition of the cars is changed after their delivery to a connecting carrier.

Instructions.—In *Alabama & V. R. Co. v. Searles*, 71 Miss. 744, it appeared that the trial proceeded upon the single inquiry as to whether cars supplied by the railroad company defendant, which was the initial receiver were suitable for the transportation of the goods in question, and it was held that an instruction that unless the evidence proved that the goods were damaged while they were in the hands of the defendant, which was the original receiver, and before delivery to a connecting line, the jury should find for the defendant, was properly refused.

Liability for Loss on Goods found to be Damaged on Arrival at Destination.—In *Searles v. Alabama & V. R. Co.*, 67 Miss. 168, which was an action against a railroad company to which grain had been delivered for transportation to a destination, to be reached over a connecting line, for damages to the shipment alleged to have been caused by the furnishing of unsuitable cars, it was held that proof of the custom of the defendant to make a careful inspection of its cars before sending them out, would not relieve it from responsibility if it appeared that at the time of the receipt of the grain it was in good condition, and was loaded into cars, the seals of which remained unbroken, and the contents undisturbed throughout the journey, but which was found damaged by wet, evidently rain, on reaching its destination.

Liability for Loss by Delays on Connecting Line.—In *Atchison, T. & S. F. R. Co. v. Richardson*, 53 Kan. 157, it was held that where a shipper sues a railroad company for damages to perishable freight, and alleges in his petition that such shipment was made to a point which is in fact beyond the line of defendant's road, under a written contract, by the terms of which it is expressly provided that the defendant shall not be responsible as a common carrier beyond its line of road, it is error to render judgment against the defendant because of delays occurring beyond the line of its road, where there is no showing of negligence on the part of the defendant, or of any injury to the freight while in its possession. *Following Berg v. Railroad Co.*, 30 Kan. 561, 16 Am. & Eng. R. Cas. 229, and citing as to the right of railroad companies to limit their liability to what happens on their lines, *Myrick v. Railroad Co.*, 107 U. S. 102, 9 Am. & Eng. R. Cas. 25.

Limitation of Liability of Initial Carrier—Effect of Charging Through Rate.

—In *McEacheran v. Michigan Cent. R. Co.* (Mich., June 26, 1894), 59 N. W. Rep. 612, it appeared that a railroad company had received goods for a point beyond its line, and that by the terms of a receipt for the same it had stipulated that in forwarding the property from the point where it left its road it was to be held as a forwarder only, and it was held that the mere fact that the company had given a through rate for freight would not, in view of the stipulation in the receipt, make it liable as a carrier beyond its own line. *Citing Railroad Co. v. McKenzie*, 43 Mich. 609, 9 Am. & Eng. R. Cas. 15; *Rickerson Roller-Mill Co. v. Grand Rapids & I. R. Co.*, 67 Mich. 110, 32 Am. & Eng. R. Cas. 487.

Offset of Presumption of Fitness of Cars Furnished by Initial Carrier, Raised by Proof of Inspection by Presumption of Unfitness Arising from Fact of Injury to Contents—Province of Jury.—In *Searles v. Alabama & V. R. Co.*, 69 Miss. 186, it was held that a presumption of the fitness of cars for the transportation of goods arising from proof that they had been inspected, was offset by a presumption of their unsuitableness arising from the fact of injury to their contents by rain, and that the question as to whether the cars were secure as originally furnished and before reaching a connecting line, was for the jury.

Sufficiency of Proof of Connection of Lines.—In *Forrester v. Georgia R. & B. Co.* (Ga., Nov. 27, 1893), 19 S. E. Rep. 811, it was held that the evidence showing that a particular freight-car, bearing a specific number, and laden with melons, was shipped from Pelham, a point on the line of the S., F. & W. Ry., and consigned to Augusta; that this identical car was afterwards in the possession of the defendant company, at Augusta; and that this company sent to the consignee a bill for the freight,—the fact that the defendant's railroad was one of a line of connecting railroads between Pelham and Augusta was sufficiently established.

Liability of Connecting Carrier—Burden of Proof to Show Condition of Shipment of Perishable Property or Freedom from Fault.—In *Forrester v. Georgia R. & B. Co.* (Ga., Nov. 27, 1893), 19 S. E. Rep. 811, it was held, that the presumption being that melons were delivered to the defendant [a connecting line] in good order, the burden of proof was on it to show, either that, when the original company received the melons, they were in a damaged condition, or that they had become so after shipment, without fault on the part of any of the carriers, that this was true, although the melons were freight of a perishable nature, and would, by mere lapse of time, become worthless, from natural, inherent causes, and that notwithstanding this fact, it was, in view of the plaintiff's evidence, tending to show that the time consumed in transportation was apparently longer than necessary, incumbent upon the defendant to prove that in fact there was no unnecessary or negligent delay by any of the carriers which caused or contributed to the damaged condition of the fruit.

Presumption as to Condition of Shipment Delivered by Initial Carrier to Connecting Carrier—Burden of Proof.—In *Louisville & N. R. Co. v. Jones*, 100 Ala. 263, it was held that where goods are delivered to a railroad company for transportation to a point beyond its own line under a through bill of lading which contains a stipulation exempting the company from liability for loss or damage occurring beyond its own terminal, and the goods are delivered to a connecting or final carrier which delivers them to the consignee in a damaged condition, the presumption is that they were delivered by the receiving to the connecting carrier in good condition, and that the damage occurred while they were in possession of the delivering carrier, and this presumption must be overcome by evidence that the damage occurred before the shipment passed out of the possession of the first carrier to entitle the owners of the goods to recover against it for the damage—the burden is upon the owner, and unless he discharges it he fails to

make out his cause of action. *Citing Railway Co. v. Culver*, 75 Ala. 587; 22 Am. & Eng. R. Cas. 411; *Cooper v. Railway Co.*, 92 Ala. 329.

Receipt for Goods "as in Good Order."—In *Forrester v. Georgia R. & B. Co.* (Ga., Nov. 27, 1893), 19 S. E. Rep. 811, it was held that a receipt by a railroad company in these words: "Bill of lading for vegetables, fruits, and melons. Issued by the S., F. & W., Pelham, Ga., July 1st, 1891. Received of J. R. Forrester, in apparent good order (inward condition and value of contents unknown), one car, said to contain melons, consigned, marked, and described as follows: 'Futch & Co., Augusta, Ga., S. A. M., 3151, via Cordele. Articles, melons,'" is a receipt for a consignment of melons as in good order; and where the car containing the same was delivered to another railroad company, whose line formed one of several connecting railroads between the point of shipment and the point of destination, the presumption, in the absence of proof to the contrary, is that this company also received the melons "as in good order," and unless the presumption is repelled by evidence the carrier is liable accordingly. *Citing Evans v. Railroad Co.*, 56 Ga. 498; *Railroad Co. v. Rogers*, 66 Ga. 251; *Railroad Co. v. Gann*, 68 Ga. 350; *Banking Co. v. Bayer*, 91 Ga. 115.

Right of Connecting Carrier to Benefit by Limitation of Liability Contracted for by Initial Carrier.—In *Central R. & B. Co. v. Bridger* (Ga., April 9, 1894), 20 S. E. Rep. 349, it was held that in order that a common carrier, by whom the transportation begun on a preceding connecting line is to be completed, may take the benefit of a special contract between the shipper and the initial carrier limiting liability in case of loss to a stipulated value per 100 pounds, it must appear either that the contract was such as to bind the initial carrier for full performance, so as to make the second carrier the agent of the first, or else that the reduced rate forming the consideration of the special contract was not confined to the line of the first carrier, but was, either by the contract itself or by the act of the second carrier in rating and billing the goods over its line, extended and applied to that line also.

Neglect of Connecting Carrier to Avail Itself of Limitation of Liability—Consideration of Limitation.—In *Central R. & B. Co. v. Bridger* (Ga., April 9, 1894), 20 S. E. Rep. 349, it was held that a special contract, expressed in a bill of lading and in the written assent of the shipper to its terms, which relates to a consignment of goods from a given point on one railway to a given point on another, and which purports on its face to be a through bill of lading, but expressly limits the undertaking of the first company to performance on its own line, with no further duty on its part but to deliver to the connecting line, and which names no rate of freight further than the terminus of the first line, but expressly excludes any guarantee of a rate beyond that point, does not bind the first company, the one with which the contract was made, to complete, either by itself or by the second company as its agent, the whole transportation; and although the contract provides on its face for extension to the second company, at the option of the latter, of the benefits secured to the former in consequence of the reduced rate, yet, it not appearing that the second company availed itself of this privilege by shipping the goods over its line at a reduced rate, and the goods having been destroyed by fire on that line, presumably by reason of negligence on the part of this company, the latter is liable to account therefor to the owner at full value, there being, so far as appears, no consideration to uphold any agreement with it, express or implied, to accept the conventional value agreed upon with the first company, and specified on the face of the bill of lading.

Right of Final Carrier to Hold Goods for Charges Shown by Way-bill—Effect of Special Contract of Shipper with Initial Carrier.—In *Illinois Cent. R. Co. v. Brookhaven Mach. Co.* (Miss., Feb. 19, 1894), 16 So. Rep. 252, it was held that where goods received by a connecting line are taken without

knowledge of a special contract with the first carrier, if such connecting line has not paid the charges shown by the way-bill, it cannot hold the goods for payment of the charges therein expressed, but must, upon tender of the amount agreed upon by the special contract, deliver the goods to the consignee, although it should be accorded a reasonable time for the purpose of ascertaining the facts as to such charges. The court said: "The owner of the goods, by intrusting them to the first carrier, invited other connecting lines to join in their transportation to their point of destination; and though, as between himself and the contracting carrier, the relation of principal and agent did not exist, there was nothing communicated to the second carrier from which the absence of that usual relation ought to have been assumed by it. It has, indeed, been held by some of the courts that knowledge by the second carrier of a special contract between the shipper and the first carrier for less than the usual rates will not preclude the second from accepting the goods and charging them with full rates over its own line. *Crossman v. Railroad Co.*, 149 Mass. 196, 40 Am. & Eng. R. Cas. 136. And it is universally held that in the absence of notice of a special contract, the contracting carrier may receive the goods and charge them with the usual charges over its own line; and very generally held that it has a lien for freight paid by it to the preceding carrier, though the rate paid be in excess of that provided for by the special contract between such carrier and shipper. *Hutch. Carr.* § 478a; *Briggs v. Railroad Co.*, 6 Allen, 246; *Wells v. Thomas*, 27 Mo. 17; *Bird v. Railroad Co.*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; *Knight v. Railroad Co.*, 13 R. I. 572, 9 Am. & Eng. R. Cas. 90; *Vaughan v. Railroad Co.*, *Id.* 578, 9 Am. & Eng. R. Cas. 41; *Wolf v. Hough*, 22 Kan. 659; *Schneider v. Evans*, 25 Wis. 241; *Loewenberg v. Railroad Co.*, 56 Ark. 439. If the Illinois Central Railroad Company had paid to the Chicago & Northwestern road the excessive rates charged by that company for the transportation of the goods, it might have retained possession of the goods until payment thereof, together with its own charge for carriage. But this was not done. The defendant company received the goods under a way-bill by which certain charges were made against the goods, and the charges it sought to collect, not as due itself by reason of its having paid them to the Chicago & Northwestern, but as due to that company, and to be collected by itself as the agent of that company. This is a totally different question from that presented in that class of cases in which payments have been actually made by the last carrier of the charges of prior ones. In these cases, the carrier, having paid out money to one apparently authorized by the owner of the goods to collect it, and having by law a lien upon them for its repayment, will not be required to release the goods, and look to the carrier to whom the money was paid for reimbursement. It may retain the goods until the money is paid, because the money is, as between itself and the owner of the goods, considered by the law as due. But in the present case the Illinois Central Company had not paid the money claimed by the Chicago & Northwestern, and the lien asserted was to secure the payment of the money due to that company. In this the defendant company was manifestly acting as the agent of the Chicago & Northwestern, and the right to retain the goods rested upon the validity of the charge upon them, and was limited thereby. The agent of the Illinois Central was entitled to retain the goods for a reasonable time within which to learn the facts; but when it was made to appear by the production of the contract between the shipper and the Chicago & Northwestern Railway Company that that company had made an overcharge, it devolved upon the Illinois Central to surrender the goods upon payment of the agreed freight (the same being more than sufficient to pay the charges due to the Illinois Central), and, having reserved what was due to itself, it would have fully complied with its duty

to the Chicago & Northwestern by accounting for the surplus. *Railroad Co. v. Marsh*, 57 Ind. 505."

Duty of Carrier to Receive Goods for Transportation.—*Lack of Facilities—Overtaxed Condition of Line.*—In *Thomas v. Wabash, St. L. & P. R. Co.* (Lancaster Mills, etc., Intervener), (U. S. Cir. Ct., S. D. Ill., Sept. 24, 1894), 63 Fed. Rep. 200, it was held that a railroad company was not bound to receive goods when it has no facilities for transporting them, or when its line is already overtaxed and congested by freight previously accepted for transportation.

Necessity of Tender of Goods for Transportation to Sustain Action for Refusal to Accept Same.—In *Wilder v. St. Johnsbury & L. C. R. Co.*, 66 Vt. 636, it was held that a general refusal upon the part of a common carrier to receive merchandise for transportation, which is not made with reference to any particular property or any definite requirement, will not dispense with the necessity of a tender of the property for transportation as preliminary to a claim for damages for refusal to transport it.

Contract of Charterer with Railroad Company to Carry Cargo of Ship—Right of Ship-owner to Sue for Breach.—In *Freeman v. Louisville & N. R. Co.* (Fla., Oct. 9, 1893), 13 So. Rep. 892, the owner of a ship sued a connecting railway carrier for damages for the detention of his vessel at the railway's terminal wharf, in consequence of the latter's alleged suspension in the receipt of such ship's cargo, and disclosed by his declaration that such ship was under charter to a third person, not a party to the suit, to deliver her cargo to the defendant railway company, and that the railway company was under contract with such third person there to receive such cargo, and the same to carry further, and it was held that under these circumstances the defendant railway company's duty to receive and carry the cargo was due directly and primarily to such third person, the charterer of the ship, that he alone could properly sue for the breach of such duty; and that, under these circumstances, if the plaintiff's ship was wrongfully delayed in consequence of the negligence of the railway company, as the agent of the charterer, such charterer, as principal, was directly and primarily responsible to the plaintiff as the ship's owner for her delay in consequence of his railway agent's wrongful suspension from receiving her cargo, and was the proper person for the plaintiff to have sued for his damage. *Citing Wordin v. Bemis*, 32 Conn. 568; *Davis v. Wallace*, 3 Cliff. 123; *Randall v. Lynch*, 12 East. 179.

Action for Breach of Contract to Transport Cargo of Ship—Sufficiency of Declaration.—In *Freeman v. Louisville & N. R. Co.* (Fla., Oct. 9, 1893), 13 So. Rep. 893, which was an action for damages for an alleged detention of the plaintiff's ship in the discharge of her cargo at the defendant's terminal wharf in the city of Pensacola, by refusing to receive such cargo for carriage over its line of road, the declaration disclosed the fact that the plaintiff's ship, whose delay was the groundwork of the action, was under a charter-party with a third person, a stranger to the suit, to deliver her cargo to the defendant at its terminal wharf, extending into the bay of Pensacola, for transportation over the defendant's road to points in the interior beyond the boundaries of Florida, and that the defendant was under contract with such charterer there to receive and transport such cargo, and it was held that the failure in a separate count, not otherwise objectionable, to allege that the suspension in the receipt of the cargo complained of was wrongful, and the failure to allege any facts from which it could appear that the alleged suspension was either tortious or inexcusable, a demurrer thereto was properly sustained.

ST. LOUIS & SAN FRANCISCO R. Co.

v.

DODD.

(59 *Arkansas*, 317.)

Action against Carrier—Amendment of Complaint Alleging Negligence as Carrier to Conform to Proof of Negligence as Warehouseman.—Where a complaint against a railroad company alleges negligence on its part as a carrier, and the proof tends to show that the negligence, if any, is chargeable to it as warehouseman, the complaint may be amended so as to conform to the proof, although the case has gone to the jury.

Same—Instruction as to Matter Not in Evidence.—The defendant requested an instruction that its failure to keep a watchman at its warehouse was not evidence of negligence on its part, but there was no evidence of any default on its part in that respect. *Held*, that the defendant could not complain of an instruction which informed the jury that though the fact that defendant had no watchman did not necessarily constitute negligence, yet they might consider that fact in determining whether or not it had exercised ordinary care.

Same—Sufficiency of Evidence of Negligence on Part of Carrier.—In an action against a railroad company for liability as warehouseman for the loss of goods stored in its depot, it appeared that a large quantity of cotton was piled on a platform very near the railroad tracks; that the weather was very dry; that shortly after a train had passed, the cotton caught fire, and that the fire extended to the depot and destroyed plaintiff's goods. *Held*, that the evidence was sufficient to sustain a finding that defendant was guilty of negligence.

APPEAL from Sebastian county circuit court.

E. D. Kenna and *B. R. Davidson*, for appellant.

T. P. Winchester, for appellees.

BATTLE, J.—On the 27th of October, 1887, C. H. Ferrell & Co. delivered to the Louisville & Nashville Railroad Company, at Humboldt, in Tennessee, five boxes of fruit-trees and plants, to be carried, delivered, and forwarded to G. W. Dodd and W. W. Burnwath, at Hackett City, in this state, upon the following conditions: (1) The Louisville & Nashville Railroad Company, and the steamboats, railroad companies, and forwarding lines, with which it is connected, and which received said property, should not be liable for loss by fire; (2) the contract of shipment should be executed, and the liabilities of the companies as common carriers thereunder should terminate, as to the forwarding carriers, respectively, on delivery to the next connecting car-

Case stated.

rier, on the arrival of the goods or property at the station or depot of delivery; and (3) "the delivering company should be liable as a warehouseman thereafter;" and (4) it was "distinctly agreed and understood that the consignee or consignees should promptly receive and take away the fruit-trees and plants as soon as the same were ready for delivery." The property was shipped under this agreement, and was received by the St. Louis & San Francisco Railway Company as a connecting carrier, and carried by it to Hackett City, and stored in its warehouse for delivery to the consignees on the 4th and 7th days of November, 1887, and while in the warehouse, and on the 13th day of the same month, between 6 and 7 o'clock P. M., was consumed by fire.

On the 24th of September, 1888, Dodd & Burnwath brought an action against the St. Louis & San Francisco Railroad Company to recover the damages sustained by the loss of the trees and plants. They alleged in their complaint that the trees and plants were delivered as before stated, to be shipped to them at Hackett City, "a point on the railroad line of the defendant;" that the Louisville & Nashville Railroad Company and its connecting lines, which connected with the defendant, under an operating arrangement for through shipment of freight, as common carriers, in due course of transit, after delivery as aforesaid, delivered the trees and plants to the defendant, * * * as a common carrier, to be by it transported thence on its line to Hackett City, Arkansas, and there delivered to the plaintiffs;" that the defendant received the trees and plants "from the Louisville & Nashville Railroad Company and its connecting lines as aforesaid, and undertook to transmit them over its line, as a common carrier, and to deliver them to plaintiffs; and that it has never delivered them to plaintiffs, or any one for them, to their damage." The defendant, in its answer specifically denied all these allegations.

In the trial of the issues, the facts were proved as we have stated them, and evidence was adduced tending to prove the following: The trees and plants were the property of plaintiffs, and were of the value of \$800. The defendant's depot at Hackett City, in which they were stored at the time they were consumed by fire, was very near its railway track. Two hundred bales of cotton, which had been received by the defendant for shipment, and for which it had issued bills of lading, were on the platform, and piled around the depot, and were 30 to 35 feet from the track. A mixed train of the defendant arrived at the depot on the morning of the 13th of November, 1887, and remained there 10 or 15 minutes. At this time

it was very dry, and the cotton was highly inflammable, and without any protection. About 10 or 15 minutes after the departure of the train a fire originated in the cotton, and spread thence rapidly to the depot, and in a short time destroyed it and its contents, among which were the trees of the plaintiffs.

Upon these facts, the court instructed the jury, substantially, as follows:

"The determination of this case turns upon the single question as to whether defendant's employé or employés at Hackett City were guilty of negligence in the care of the trees, from which negligence the loss occurred.

"Before the plaintiffs can recover, they must prove, by a fair preponderance of the evidence, of negligence on the part of the defendant.

Negligence is the want of ordinary care; that is, such care as an ordinarily prudent man would exercise in the place of, and under the same circumstances as, the party charged with negligence.

"The fact that the defendant had no watchman at the depot at the time of the burning is not necessarily negligence on its part. It is simply a circumstance for you to consider for what it may be worth, in determining whether defendant was exercising ordinary care in preserving the trees from loss."

At the same time the defendant asked the court to instruct the jury, among other things, "that because the defendant did not keep a watchman is no evidence to charge neglect upon the defendant;" and the court refused to instruct in the form asked, but did in the manner we have stated.

While the jury were considering their verdict, the court, over the objection of the defendant, permitted the plaintiffs to amend their complaint as follows: "Plaintiffs further allege that said defendant company received fruit-trees and plants at its depot at Hackett City, and so negligently and carelessly kept said goods that they were, by defendant's fault and negligence, wholly destroyed by fire in its depot building at Hackett City, and so wholly lost to these plaintiffs."

The jury returned a verdict in favor of plaintiffs against the defendant for \$800.15, and 6 per cent per annum interest thereon from the 13th of November, 1887, the day of the fire, and the court rendered judgment accordingly. The defendant saved its exceptions, filed a motion for a new trial, which was overruled, tendered a bill of exceptions, which was signed, and filed the same, and appealed.

1. The first contention of the appellant is, the trial court erred in permitting the amendment of the complaint. The

ground of its contention is, the amendment converted the action from an action *ex contractu* to an action *ex delicto*. But this was not done. The amendment showed only a breach of the contract that the appellant entered into when it undertook to hold the property of the appellees as a warehouseman.

Amendment of
complaint to
conform to
the proof.

Every warehouseman for hire undertakes to exercise ordinary care and diligence in the preservation of the property entrusted to him. If he fails to use such care and diligence he is guilty of negligence and a breach of his contract, and is liable for damages.

2. The appellant contends that the court erred in what it said in its instructions to the jury in respect to a watchman. In support of this contention, it says: "There was not a word in the testimony directed to the question of a watchman being employed or not employed. There was no allegation or proof directed to this point.

Complaint as
to instructions. There was absolutely nothing to apprise defendant that negligence would be insisted upon for the reason that no watchman was employed; and yet the court takes this single circumstance in the case, and directs the attention of the jury to it, and, from the instructions given, the jury doubtless concluded that they were authorized to infer negligence from this circumstance." In attacking the instructions of the court in this manner the appellant obviously failed to call to mind that it asked the court to instruct the jury "that because the defendant did not keep a watchman is no evidence to charge neglect upon the defendant." It virtually conceded that no watchman was employed, and the court, in response to its requests, told the jury that fact was not necessarily negligence, but a circumstance for them to consider for what it was worth, in determining whether the defendant was exercising ordinary care in preserving the trees from loss. After it had called forth this instruction it had no right to complain because the court had given an instruction upon the subject on which it had demanded one, and to say that the instruction was calculated to lead the jury to believe that they had a right to infer negligence from the failure to employ a watchman. There is nothing in the instruction that intimates such a thing. It left to the jury to determine whether, in the exercise of ordinary care, it was negligence to fail to employ a watchman, having first defined "ordinary care" to be such care as an ordinarily "prudent man would exercise in the place of, and under the same circumstances as, the party charged with negligence;" that is to say, the defendant in this case. Under such circumstances we see nothing in the instruction prejudicial to the appellant.

3. Appellant insists that there was no evidence to show negligence, and sustain the verdict of the jury. In the contract in this case it was expressly stipulated that the liability of appellant, as a common carrier, should terminate on the arrival of the trees and plants at the station or depot of delivery, and that it should be liable as a warehouseman thereafter. When, therefore, the property was stored in the appellant's depot at Hackett City, it became liable as a warehouseman, and bound to exercise ordinary care and diligence in the preservation of the property, which is such care and diligence as men of ordinary prudence in the same business usually bestow on property placed in their custody, and similarly situated in its exposure to loss. What constitutes such care and diligence is a question which depends for its answer upon the peculiar circumstances of each case, such as the nature and value of the property; its exposure to damage and loss; its proximity to danger from fire; the means employed to prevent or arrest the progress of fire; the location, character, and construction of the storehouse in which it was placed,—and in cases like this is a question peculiarly proper for the determination of the jury.

Sufficiency as
to evidence of
negligence.

The depot or warehouse of the appellant, in which the property of appellees was stored at the time it was destroyed by fire, was, and had been for many days, surrounded by cotton,—a highly inflammable material,—at a time when the weather was very dry, and was near a railway track on which trains were passing daily. The cotton was liable to take fire from these trains, and communicate it to the depot. One of them passed 10 or 15 minutes before it was destroyed. The cotton caught fire, and the depot was consumed by it. These were facts from which the jury might have inferred that the fire originated in sparks from the engine of the train which had just passed, there being no evidence to explain its origin upon any other theory. All these facts tended to show that the property of appellees was destroyed through the negligence of appellant, and are sufficient to sustain the verdict of the jury in this court. *Barron v. Eldredge*, 100 Mass. 445; *Smith v. Railway Co.*, L. R. 6 C. P. 14; *Railroad Co. v. Scott*, 42 Ill. 132; *Railroad Co. v. Frazier*, 64 Ill. 28; *Railroad Co. v. Nelson*, 51 Ind. 155; *Troxler v. Railroad Co.*, 74 N. C. 377.

Judgment affirmed.

Liability of Railroad Company as Warehouseman.—See *Gregg v. Illinois Central R. Co.* (Ill.), *ante*, p. 208, and note, 217.

Actions Against Carriers—Limitation of Action—Alabama Statute.—In *Alabama & G. S. R. Co. v. Eichofer*, 100 Ala. 224, it was held that a right of action against a common carrier for breach of a contract for transporta-

tion was within section 2615 of the Code limiting certain actions on contract to six years, and was not governed by section 2619 limiting certain actions for torts to one year.

Pleading—Sufficiency of Complaint—Necessity of Averment that Defendant is Common Carrier.—In *Louisville & N. R. Co. v. Gerson* (Ala., Feb. 13, 1894), 14 So. Rep. 873, it was held that in an action against a railroad company on a contract of carriage, the fact that defendant is a common carrier should be averred in the complaint. The court said: "All carriers without hire may be said to be private carriers. Compensation in some form, either by the payment of its price, or a promise express or implied to pay it, is essential to constitute a common carrier. If one undertakes to carry goods for another gratuitously, he is a mere mandatory, and liable only for gross negligence. It is not necessary, however, that there should be an express contract with a railroad company or any other common carrier, for the transportation of freight, to render it liable for failure to deliver in safety. Proof of delivery of goods, with directions as to their carriage, and of the acceptance of them by the carrier, would give rise to an undertaking on its part, to carry them according to directions. No such implication will be indulged to fix a liability on a private person. Hence, when a common carrier is proceeded against at law, on a contract express or implied, and especially, if implied, for a failure to deliver in safety, it should be averred in the complaint, that the carrier is a common carrier. *Hutch. Carr.* §§ 16, 17, 19, 35, 763; *Ang. Carr.* 17-41; *Story, Bailm.* § 174; *Knox v. Rives*, 14 Ala. 257; *Haynie v. Waring*, 29 Ala. 265; *Railroad Co. v. Lampley*, 76 Ala. 364, 23 Am. & Eng. R. Cas. 720; *Railway Co. v. Kolb*, 73 Ala. 396; *Melbourne v. Railroad Co.*, 88 Ala. 449; 19 Am. & Eng. Enc. Law, 903."

Joinder in Declaration of Counts on Contract and in Tort—Massachusetts Practice Act.—In *Central Vermont R. Co. v. Soper* (U. S. Cir. Ct. App., 1st Cir., Jan. 12, 1894), 59 Fed. Rep. 879, it was held that the Massachusetts practice acts permit a plaintiff in an action against a carrier to combine in the declaration a count on a bill of lading, or on the agreements contained therein, and a count in tort based on the common-law liability of the carrier.

General Denial by Carrier—Waiver of Failure to Plead Specific Defenses Arising from Stipulations in Bill of Lading—Waiver of Variance.—In *Central Vermont R. Co. v. Soper* (U. S. Cir. Ct. App., 1st Cir., Jan. 12, 1894), 59 Fed. Rep. 879, it was held that while a mere denial of the allegations of a declaration in an action against a carrier, will not, under the general rules of pleading, permit the defendant to avail itself of a defense based on a provision in the bill of lading, that no action can be maintained for loss or damage unless a claim therefor shall be made within a reasonable time, and suit brought on such claim at another time specified, yet in the absence of anything in the record to the contrary, the appellate court will assume that any objection by plaintiff in that connection was waived at the trial.

It was further held that the same conditions will amount to a waiver of a variance charging the defendant as common carrier, when the proofs show its liability to be that of warehouseman.

Evidence—Necessity of Proof of Fault of Carrier.—In *Jordan v. American Exp. Co.* (Me., Feb. 13, 1894), 29 Atl. Rep. 980, it was held that no action can be maintained against a common carrier for hire to recover damages for not safely carrying merchandise, when the proof fails to connect the carrier with any fault touching the article intrusted to it for carriage.

Burden of Proof of Negligence.—In *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, it was held that where there is proof of the fact of an injury to goods in charge of a carrier for transportation, and the manner of its occurrence in circumstances which do not import negligence of the carrier, whose contract is for a limited liability only, it is not liable except upon

proof of negligence on its part as an inducing cause of the injury, and the burden of making such proof is upon the plaintiff. The court said: "Such are the cases of *Farnham v. Railroad Co.*, 55 Pa. St. 53; and *Patterson v. Clyde*, 67 Pa. St. 500. In the latter of these cases Mr. Justice AGNEW said, speaking of the carrier: 'When he has shown a loss within the exception of his contract, without apparent negligence, he has brought himself within the terms of his bargain. On what principle is that bargain to be nullified by requiring of him the production of that evidence, the loss or difficulty of obtaining which was the very reason for limiting his responsibility?' In that case the ship was destroyed by a fire at sea, with all her cargo, but without proof as to the manner of the accident; and it was held there was no liability without affirmative proof of negligence, the burden of which rested upon the plaintiff.

"In the case of *Railroad Co. v. Raiordan*, 119 Pa. St. 577, a right of recovery also was denied because there was no affirmative proof of negligence given by the plaintiff. The freight carried was a horse, under a limited-liability contract, and it was shown that the animal was in good condition when shipped, but was found dead when the car was opened. There was no proof as to how the animal died, but there was proof that no accident happened to the train or the car in which the horse was placed. We held that, in the absence of proof as to how the horse died, and of any proof of negligence by the defendant, there could be no recovery. Our Brother WILLIAMS said: 'If for any reason an "injurious accident" happens to or by reason of that which the carrier provides for the transportation, the law, which imposes the exercise of the utmost care upon him, presumes the accident to be due to the want of that care, and puts upon him the duty of successfully relieving himself from that presumption. But when the fact of an "injurious accident" is not shown to exist, the presumption which arises from it cannot be invoked by a plaintiff.' We held that in the absence of any proof of the happening of an accident, or the negligence of the carrier, the court below should have given a binding instruction to find for the defendant.'

"In the case of *Phoenix Pot-works v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 284, which was very like the present case, we held it was for the jury to say whether upon the whole testimony the injury to the freight was occasioned by the negligence of the defendant. There was proof that the pots were carefully packed, and that there was no collision or derailment on the way. There was no direct testimony as to how the injury occurred, or of any specific negligence on the part of the defendant. The court below left the case to the jury, saying to them: 'It is for you to say whether there was any negligence on the part of the railroad company, and we affirmed the correctness of this direction.'"

Admissibility in Evidence of Duplicate Bills of Lading.—In *Edgerton v. Wilmington & W. R. Co.* (N. Car., Oct. 16, 1894), 20 S. E. Rep. 184, which was an action against a carrier to recover for the failure to deliver certain merchandise alleged to have been delivered to it for transportation, it was held that duplicate bills of lading copied from stub-books from which the original bills had been issued, by the carrier's agent were inadmissible in evidence against the carrier. The court said: "What are called in the record 'duplicate bills of lading copied from the stub-books from which the original bills were issued' evidently purported to be mere copies of the bills of lading made by the defendant's local agent some time after the originals were issued, the data for making them being obtained from the 'stubs' of the originals. They were nothing more, in effect, than declarations of that agent that the 'stubs' in the books of the defendant showed that on certain days it had received certain bales of cotton for shipment. It is well settled that declarations of an agent as to a past transaction are not evi-

dence against his principal. *Smith v. Railroad*, 68 N. Car. 107; *McComb v. Railroad Co.*, 70 N. Car. 178; *Rumbough v. Improvement Co.*, 112 N. Car. 751. The admission of this evidence was tantamount to allowing the witness to testify that some time after the shipments were made the defendant's local agent told him how many bales of cotton were received by the defendant."

Proof of Damages—Competency of Witness to Prove Value of Grain at Destination—Evidence of Value of Damaged Grain.—In *Alabama & V. R. Co. v. Searles*, 61 Miss. 744, which was an action by a shipper for damages to grain delivered to the defendant for transportation, and which was alleged to have been damaged because of the unsafe and unsuitable condition of the cars supplied by the defendant, it was held that a person engaged as a dealer in grain of the character shipped, who was advised of the "current market reports" and had made actual sales of the goods in question, was a competent witness to testify as to their value at the place of their destination. *Citing* *Sisson v. Railroad Co.*, 14 Mich. 487; *Brackett v. Edgerton*, 14 Minn. 174.

It was further held that the price at which the damaged grain was sold after a fair trial to obtain the best price for it, was competent evidence of its value. *Citing* *Sullivan v. Lear*, 23 Fla. 463.

Province of Jury—Right to Consider Fragile Nature of Goods as Tending to Rebut Presumption of Carrier's Negligence.—In *Buck v. Pennsylvania R. Co.*, 150 Pa. St. 170, it was held that where goods are of so fragile a nature that a breakage is liable to occur even from careful handling, that fact may be considered by the jury as evidence tending to rebut the presumption of negligence on the part of the carrier.

As to Disclosure of Nature of Goods Shipped—Negligence of Carrier.—In *Rathbone v. New York Cent. & H. R. R. Co.*, 140 N. Y. 48, it appeared that goods described in the shipping receipt as two boxes of marble, contents and value unknown; contained, according to one witness, marble statuary, marked "Marble Statue," or "Marble Figure," or "Statuary," "Handle with care, This side up," and according to another witness "Statuary," or "Fine Statuary," "Handle with care," or "Handle with great care;" that when the boxes were delivered to the defendant, the truckman who brought them was asked, "What have you here?" that the truckman replied, "It is a marble statue; you want to handle it very carefully," and that thereupon defendant's servant took charge of the box and delivered a shipping receipt to the truckman. It further appeared that the plaintiff had employed a well-known art-dealer to make the shipment; that the dealer had been engaged in shipping valuable works of art over defendant's road for 27 years; and that this shipment was made in the usual manner, and it was held that plaintiff was entitled to a submission of the case to the jury upon the question of waiver of fraudulent concealment and of the defendant's negligence, and that the direction of a verdict for defendant was error.

As to Delivery—Conflicting Evidence.—In *Alabama & G. S. R. Co. v. Eichofer*, 100 Ala. 224, which was an action against a railroad company for non-delivery of goods shipped by it at Atlanta to New York, the evidence adduced by defendant was to the effect that the goods arrived at New York 23 days after their shipment, and thence on, for over three years, were properly stored there ready for delivery, but that the consignee did not appear to receive them, although reasonable effort was made on the part of the delivering carrier to find him, and that subsequently the property was sold for freight charges; while the proof on the part of the plaintiff showed that the goods had not reached their destination at a period varying between two and three months after shipment, and that defendant's agent was unable to trace them nearly five months thereafter, and it was held that the question of non-delivery was properly for the jury.

In *Alabama & V. R. Co. v. Goforth* (Miss., Nov. 20, 1893), 14 So. Rep. 457, the following opinion was delivered: "The verdict of the jury in the court below is not supported by the evidence. It is clearly contrary to the evidence, and it should have been promptly set aside on appellant's motion in the trial court. The testimony, taken together, can generate but one belief, viz., that the three bales of cotton for whose value recovery is sought by appellee were the three bales Nos. 25, 26, and 27, respectively, and accounted for in the deposition of the appellee's witness, Phelps. It is perfectly clear, on the whole record, that these numbers were erroneously duplicated, and that they should have been, in consecutive order, 45, 46, 47. Every bale of appellee's cotton shown by the record before us to have been embraced in the business of 1890-'91 is clearly accounted for, and to permit him to recover from the railway company the value of three bales never lost would be to legalize naked spoliation, as we now see the matter."

Damages—Right to Punitive Damages for Rudeness of Agent of Carrier.—In *Illinois Cent. R. Co. v. Brookhaven Mach. Co.* (Miss., Feb. 19, 1894), 16 So. Rep. 252, it was held that in an action against a railroad company to compel the delivery of goods alleged to be wrongfully withheld, the company is not liable to the plaintiff in punitive damages because of mere brusqueness on the part of its agent, not amounting to insult, in refusing to comply with the demand for delivery.

Action Involving Examination of Long Accounts—Compulsory Reference.—In *Chicago & N. W. R. Co. v. Faist*, 87 Wis. 360, which was an action by a railroad company against persons operating an elevator to recover demurrage, two long series of charges in the form of accounts were attached as schedules to the complaint, and showed with particularity the number of each car detained, the date and time of its detention, and the amount claimed by reason thereof, and it was held that such schedules were accounts within the meaning of a statute (Rev. St., § 2864), authorizing a compulsory reference where the issue involves the examination of long accounts.

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(40 *Nebraska*, 356.)

Discretion of Trial Judge as to Special Findings.—It is discretionary with the trial judge to submit, or not submit, special findings to the jury, and where it appears that there has been no abuse of such discretion, in refusing to require a jury to make special findings, such refusal is not erroneous.

Action Against Carrier for Loss of Goods—Measure of Damages.—Where property delivered to a common carrier for shipment is destroyed while in transit, the measure of the shipper's damages is the market value of the property at its place of destination, at the time it should have been delivered there.

Exclusion of Evidence.—The action of the trial court in excluding certain testimony examined and held to be correct, and not error.

Right of Witness to Refresh Memory.—A memorandum which it appears was prepared at the time of the fact in question, or soon afterwards, which the witness knew to be correct at the time it was made, may be used by him to refresh his memory.

Competency of Expert Testimony on Commonplace Matters.—Evidence in the nature of expert or opinion testimony is not competent, and cannot be received, upon a subject of inquiry which is of such a kind or character as to be within the knowledge of men of common education and experience, and to require no special skill, knowledge, or experience in considering or forming an opinion upon it, as the jury will be presumed, if all the facts are before them, to be competent to draw an inference and form an opinion from such facts.

Right of Carrier to Limit Its Liability Against Negligence.—A contract between a shipper and a common carrier, which, by its terms, limits the liability of the carrier, and relieves it from either entirely or partially responding in damages for injury or loss to property shipped under such contract, resulting from its negligence, is invalid or void, under the common-law rule, as against public policy.

Refusal to give Instruction Sufficiently Covered.—It is not error for a court to refuse to give an instruction to a jury, when the points covered by the instruction requested to be given have been fully and fairly submitted to the jury by other instructions.

ERROR to Nuckolls county district court.

Geo. R. Peck, F. A. Brogan, A. A. Hurd, and G. W. Hurd,
for plaintiff in error.

John M. Ragan and J. B. Cessna, for defendant in error.

HARRISON, J.—W. E. Lawler, the plaintiff in the court below, commenced an action in the district court of Nuckolls county, Neb., to recover from the defendant railroad company the value of certain property shipped by him over the defendant's line of road from Superior, in this state, to Trinidad, in Colorado.

Case stated. The petition pleaded the corporate character of the defendant. That it was a common carrier for hire, and owned and operated a line of railroad extending from the city of Superior, Neb., to Trinidad, Colo., and had an office in Superior for the transaction and management of its business.

That it made contracts for the shipment of freight to Superior from any point in the United States, and also from Superior to any point in the United States.

That on the 20th day of December, 1890, the plaintiff resided in Superior, and was the owner and possessed of a lot of household goods,—a piano, chairs, tables, beds, bedsteads, etc.,—and a buggy, and also owned a stock of boots and shoes, shoemaker's tools, store fixtures, etc.

“That on the said 20th day of December, 1890, this plaintiff desired to remove to the city of Trinidad, in the state of Colorado, to engage in business in said city, and he desired to have transported thither all his said household effects, and his said stock of boots and shoes, and shoemaker's tools, and store fixtures; and this plaintiff on said date entered into a verbal contract with said defendant, in and by which the defendant agreed that the said plaintiff should load all of his said described property into a car to be furnished him by said defendant at its depot in the said city of Superior. And thereupon the said defendant agreed to transport said car and property to the said city of Trinidad, in the state of Colorado, and there safely deliver all said property to this plaintiff within a reasonable time from this date, in consideration of the sum of \$100, freight charges, to be paid to the defendant by this plaintiff.

“That thereupon, on or about the said 20th of December, 1890, the plaintiff went to the said city of Trinidad, Colorado, and left one Fred. W. Saltow to load said property of plaintiff into the car agreed to be furnished by the said defendant, and to pay the freight of the same, and to see that the said property was shipped as agreed.

“On the 27th day of December, 1890, said Saltow put all of the said property, above described, of the plaintiff, into a car furnished this plaintiff by the defendant, on its contract, at its depot in the city of Superior, Nebraska, for shipment to Trinidad, Colorado, to be there delivered to plaintiff by the defendant, as per said contract; and the said Saltow, on behalf of the plaintiff, then and there paid to the defendant the \$100 compensation or freight-money agreed upon between plaintiff and the defendant, and for which the defendant agreed to transport and safely deliver the said property of this plaintiff.

“That thereupon the defendant issued and delivered to the said Saltow, for this plaintiff, a waybill, bill of lading, or receipt for said goods. But this plaintiff, nor the said Saltow, did not examine nor read such receipt or bill of lading and never knew the contents of same, until after the happening of the loss hereinafter mentioned; nor did the said defendant, or any of his agents or servants, at any time until after the happening of the loss hereinafter mentioned, call the attention of this plaintiff or the said Saltow to the conditions or terms of said bill of lading or paper.

“And the plaintiff charges the fact to be that the said paper or bill of lading or receipt, by whatever name it may be called, so delivered by the said defendant to the said Saltow

for this plaintiff, was not the contract entered into between the plaintiff and defendant for the shipment of the goods as aforesaid, and that neither the plaintiff nor the said Saltow ever knew or consented to the terms of the said bill of lading, and had they, or either of them, known that it contained this clause, to wit, 'Car Emgt. & Stk. val. \$5.00 cwt.,' which clause means, 'car of emigrant goods and live stock, of the value of \$5 per hundred weight,' would the said plaintiff or the said Saltow have allowed said defendant to take said goods. But the said defendant, nor any agent or servant of it, did not call the attention of said Saltow or this plaintiff to said clause in said receipt or bill of lading, but the said defendant and its agents, fraudulently concealed from said Saltow and this plaintiff said clause in said bill of lading.

"The plaintiff further alleges that said clause in said bill of lading was never known to or seen by this plaintiff or the said Saltow, or either of them, until after the happening of the loss hereinafter mentioned, and that the same was not the contract of shipment made by this plaintiff with the said defendant for the shipment of said goods, but was an attempt on the part of the defendant to change, limit, and modify the contract actually made by said plaintiff with said defendant for the shipment of the goods.

"And the plaintiff further alleges that the said Saltow, when he received the said bill of lading or paper from the said defendant, supposed the same to be a mere receipt for the goods; and this plaintiff never saw the said bill of lading until after the destruction of the goods, as hereinafter stated. That said bill of lading or receipt delivered by the said defendant to said Saltow for the said goods was partly in writing and partly in print, and was and is, as nearly as the plaintiff can produce the same, in words and figures as follows:

" 'Atchison, Topeka & Santa Fe Railroad Co.

" 'Superior, Neb., Station. Dec. 27, 1890.

" 'Received from W. E. Lawler the following-described property, in apparent good order (or condition noted), contents and value unknown, to be transported over the road, and delivered in like order to consignees, or the next company or carriers (if same is going beyond its line of road), for them to deliver to the place of destination of said property; it being distinctly understood that this company shall not be responsible as common carriers for said property beyond its line of road, or while at any of its stations awaiting delivery to such carriers, this company being liable as warehousemen only:

“ ‘To W. E. Lawler, Consignee, Trinidad, Colorado.

“ ‘Charges advanced, \$——.

Marks and Numbers.	Articles.	Weights Subject to Correction.
	Car Emgt. & Stk.	20,000
	Or Rel.	.
	Val. \$5.00 cwt.	1
	Prepaid \$100.00.	
	Car 12144.	
	W. G. Taylor, for the Company.'	

“ And the plaintiff further alleges that the defendant and its agent at the time, and before said goods were put in said car and received by the said defendant, knew the character, quality, quantity, and the destination and ownership, of said goods. The said defendant entered into the contract, as above stated, with the plaintiff, to safely transport said goods from the city of Superior, Nebraska, and safely deliver said goods to this plaintiff at Trinidad, Colorado, for the sum of \$100; and the said defendant furnished to this plaintiff a car for the shipment of said goods.

“ The plaintiff loaded all of said goods in said car, consisting of household goods, including piano, a buggy, a lot of bedsteads, bedding, and clothing, and the stock of boots and shoes, and store fixtures. And the said defendant, with a full knowledge of their character, quality, quantity, ownership, and destination, accepted the said goods, took possession of the said car, and undertook to transport them from Superior, Nebraska, to Trinidad, Colorado, and that while the said goods were in transportation over the said railroad of the defendant, in some manner or means to this plaintiff unknown, but through the neglect and carelessness of the said defendant, or its agents or servants, said goods were either lost or destroyed, or converted to the use of the said defendant. But the said defendant has never complied with the terms of its contract, or has it delivered said goods, or any part of the same, to this plaintiff, or to any person for him, at Trinidad, Colorado, or at any other place.

“ That said goods, at the time they were to be delivered to

this plaintiff at Trinidad, Colorado, were then and there of the value of \$7000."

Plaintiff asks judgment against defendant in the sum of \$7000, with interest at 7 per cent per annum from January 1, 1891.

The defendant railroad company, for answer, denies each and every allegation of the petition, except such as are afterwards admitted, qualified, or explained.

Further answering, it admits that it is a corporation, that it executed the bill of lading described in the petition, but states that it was executed November 27, 1890, and not on December 25, 1890, and alleges that if the car containing the property mentioned in said petition did not arrive at Trinidad, as alleged in said petition, said defendant avers that the same was caused by the carelessness and negligence of the said Fred. W. Saltow, the agent and servant of said plaintiff, who was accompanying, and had charge of, said car, for, on behalf of, and instead of, said plaintiff, at said plaintiff's special instance and request, by carelessly and negligently leaving a burning lamp or lantern in said car, which set fire to said car, and that on account of which said plaintiff's property was consumed by fire on or about the 28th day of November, 1890, at Piercerville, in the state of Kansas, and that the same was not the result of any negligence or carelessness on the part of said defendant.

The said defendant, further answering said petition, avers that on the 27th day of November, 1890, said plaintiff made, executed, and delivered to the said defendant herein his release and guaranty, whereby, and by the terms of which, he released the said defendant from all liability from damages or loss to said property, arising from fire and other causes. A copy of said release and guaranty so signed by said plaintiff herein is hereto attached, marked "Exhibit A," and made a part of this answer:

"Exhibit A. Atchison, Topeka & Santa Fe Railroad Co. Release and Guaranty. No. — November 27th, 1890."

In consideration of the transportation at a reduced rate (as provided and shown in the classification and tariffs published by this company, and which are hereby referred to, and made a part hereof) of the following-described property, viz. one car emigrant outfit and stock, released to value of \$5.00 per cwt. case of loss or damage, from Superior, Neb., to Trinidad, Colo., the same being consigned to W. E. Lawler, of Trinidad, via A., T. & S. F. Ry., hereby release all the companies over whose lines said property may pass, to its destination, from any and all liability from damage to or loss of said property, arising from fire or wet; chafing or breaking; effect

of heat or cold; leakage of liquids; loss of weight, or otherwise, of property in bags; decay of perishable property; injury to hidden contents of package; delays arising from breakage of or accident to engines, cars, tracks, or bridges, deficiency of side tracks, motive power, or cars; or loss or damage by providential causes. And I hereby agree to hold such companies harmless, and protect them against any claim which may arise from damage or loss as above specified. And I also guaranty, that the through charges, unless prepaid, shall be paid at destination, as per bill of lading or the company's tariffs.

[Signed] W. E. LAWLER.

Witness: [Signed] E. S. AGUR.

"To be signed by a responsible party, and witnessed, when convenient, by the agent of the company. Agents please fill out promptly, have signed and witnessed, and attached to way-bill on which property is forwarded. For their own protection, agents should have a good press copy, or retain a duplicate release attached to copy of way-bill."

To this answer the plaintiff filed a general denial to each and every allegation of new matter therein contained. Of the issues thus joined a trial was had to the court and a jury, and the jury returned a verdict for plaintiff in the sum of \$4373. The defendant filed a motion for a new trial, which was argued, submitted, and overruled; and the case was brought here, by petition in error on the part of the railroad company, for review.

The evidence establishes that W. E. Lawler in November, 1890, was a resident of Superior, this state, and having concluded to remove to Trinidad, Colo., applied to the agent of the plaintiff in error at Superior, and made inquiry of him in regard to shipping his stock of boots and shoes, shoemakers' tools, and household goods to Trinidad. He was informed as to the different rates; and the rate on boots and shoes was \$160, and on an emigrant outfit \$100, per car.

It appears that Lawler had at this time in his employ a shoemaker, one Fred Saltow, who desired to go with him to Trinidad, and whom Lawler wanted to take along, and retain in his employment; that Lawler spoke to the agent in regard to Saltow, and stated to him that he would like to get a pass for Saltow, or obtain transportation for him, at as light an expense as possible, or none, if it could be so arranged; that it was agreed that some pigs were to be bought and put in the car, and this would entitle them to pass one man through with the car; that Lawler went east, and left the loading of the goods into the car, etc., in charge of Saltow, who, assisted by some other parties, placed the goods in the car, and with

them the two pigs which he had purchased; that Saltow signed the necessary papers for Lawler, and received a pass or transportation to Trinidad; that the car containing the goods was, in the usual course of business of the railroad, taken into a train, and started on its way to its destination; that Saltow boarded the same train, and the first night slept in the car which contained Lawler's goods.

It nowhere appears in the evidence that Saltow was to have any charge of the car, or to pay any attention to it. It does appear that he at one time contemplated delaying his departure for Trinidad until some days subsequent to the starting of the car containing the goods, but finally did go by the same train, and had the key to the car in which the goods were shipped.

At Pierceville, Kan., the car in question was discovered to be on fire, and was totally destroyed, together with the goods. The claim of the company is that the car was set on fire by a coal-oil lantern, which it is further claimed Saltow lighted, and left, in that condition, in the car, while he was riding in the caboose.

There is a conflict in the evidence on this point, and Saltow swears that the lantern was not burning. Some of the witnesses for the company state that he told them that he had left a lighted lantern in the car. The jury evidently believed Saltow, or, if they did not, concluded from the evidence that he was not properly in charge of the car for Lawler, either of which findings on the subject would be consistent with the verdict rendered by them.

It appears that the agent of the company at Superior had full knowledge of the loading of the car,—of all its contents,—and probably some of the articles or things constituting the car-load were included, following suggestions advanced by him at the time of the making of the contract for the car, and transportation of the goods to Trinidad.

The foregoing is a statement of the testimony, sufficient, we think, to present its main or salient points, which will be involved in our consideration of the case here.

The plaintiff in error sets forth in its petition in error different causes of complaint or objection to the rulings and actions of the court below during the trial of the suit there, but, in the brief filed in this court, does not argue all of them, but selection is made of those which were evidently considered the leading ones, and most material; and the argument in the brief is directed to the assignments of error thus chosen, and to them we will mainly, if not wholly, confine our examination.

The first point which challenges our attention is that the

court erred in not submitting to the jury special findings requested by defendant, numbering in all 14, but more especially those numbered 1, 4, 8, 10, 13, and 14. Section 4813 (Cobbey's), Consol. St. 1893, p. 1108, providing for special findings, is as follows: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. * * *" It will be noticed that the word "may" is used in the statute wherever reference is made to the court's action in submitting special verdicts or findings to the jury. In the statutes of some states the word "shall" is used in this connection; and, where the word "shall" is used the courts hold that when the findings are in proper form, and the request to submit is at the proper time, the judge must submit them. But, on the other hand, where "may" is used, as in our law, it is discretionary with the trial judge or court to submit special findings or not, however proper or pertinent they may be in substance, or sufficient in form. *Floaten v. Ferrell*, 24 Neb. 353; *Insurance Co. v. Christiensen*, 29 Neb. 581; *Express Co. v. Pollock*, 12 Ohio St. 618; *Ward v. Busack*, 46 Wis. 407; *Webb v. Railway Co.*, 7 Utah 17, 44 Am. & Eng. R. Cas. 683; *Railway Co. v. Miller*, 79 Tex. 78; *City of Topeka v. Tuttle*, 5 Kan. 311-323; *Hairgrove v. Millington*, 8 Kan. 480.

Discretion of
trial court—
Submission of
findings.

In Oregon, under a section of the Code of that state which provides that the court may in all cases instruct the jury, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, it was held: "It is discretionary with the trial court whether it will require the jury to make special findings, and such discretion is not reviewable." *Knahtle v. Railway Co.*, 21 Oregon 136, 48 Am. & Eng. R. Cas. 116, citing *Swift v. Mukley*, 14 Or. 59. This is also supported by *Webb v. Railway Co.*, *supra*. We think it is the better rule that it is a discretion which must be soundly and reasonably exercised by the court, or trial judge, and its exercise may be reviewed, as may the exercise of other discretionary powers. We then have only the question, on this branch of the case, for determination, was the refusal to submit the special findings requested by defendant an abuse of the discretionary power of the trial court, or an improper exercise of it? The case was not a very complicated one, and the facts to be considered, and the questions to be deter-

mined from them, by the jury in their deliberations, were not very numerous; and after a careful and thorough examination of all the facts and circumstances of the case, as presented and preserved in the record, the manner in which the case was tried and submitted to the jury, we cannot discover any arbitrary or partial exercise or abuse of discretion, in the refusal of the trial judge to present the 14 questions to the jury for them to answer.

Counsel for plaintiff in error, during his cross-examination of Lawler in the lower court, asked him the following questions: "Your business had been unsatisfactory for considerable time before that, had it not?" "You may state if you had not been advertising, for a long time before leaving Superior, that you were selling these goods at cost." "You had been selling your stock of boots and shoes at cost, or at reduced prices, and were you not closing out your stock for considerable length of time before leaving Superior?"—to each of which the counsel for Lawler interposed an objection,—to the first one quoted, that it was immaterial; to the second, that it was incompetent and immaterial; and, to the third, that it was incompetent, immaterial, and irrelevant. These objections were sustained by the court.

The counsel for plaintiff in error, in the examination of W. G. Taylor, a witness called by his client (the company), interrogated him as follows: "State, if you know, whether, before he quit business, he advertised that he would sell his stock at reduced prices." "State, if you know, as a matter of fact, whether the plaintiff did, for several months before quitting the sale of boots and shoes, try to sell his goods at reduced prices or at cost,"—each of which interrogatories was objected to by counsel for Lawler as being "incompetent, immaterial, and irrelevant," and the objections were sustained by the court. The action of the judge in sustaining the several objections above indicated is assigned for error in paragraphs Nos. 23, 24, 25, 29, and 30 of the petition in error, and will be noticed together, as the reasoning which will apply to one will apply with equal force to all.

It is contended by counsel for plaintiff in error that inasmuch as Lawler had testified that he fixed the value of the stock of boots and shoes by adding to the cost price thereof freight to Superior, and also freight from Superior to Trinidad, the evidence sought to be elicited by the foregoing interrogatories was material and competent on the question of the value of the stock of goods, and that the value of the stock of boots and shoes was the measure of Lawler's damages, if he recovered any.

There would be some force in the argument of counsel for plaintiff in error, if the measure of Lawler's damages was to be determined by any value which the stock of boots and shoes had in Superior, as the questions were all directed to what transpired in Superior, but the rule for determining Lawler's damages in this case was the value of the goods at their place of destination (Trinidad) at the time they should have been delivered there to him by the company. Hence, the testimony excluded by the court in sustaining the foregoing objections could have no possible bearing on the point to be determined, i. e., the value of the goods in Trinidad, Colo., and the court did not err in its action. As to the rule on the measure of damages, see *Ward v. Railway Co.*, 47 N. Y., 29; 5 Lawson, Rights, Rem. & Pr. § 2634, and cases cited; Hutch. Carr. § 769. Exclusion of evidence.

During the cross-examination of Lawler, he was asked: "Why did he give him a pass? What did you understand about it, why a man should have a pass to go with an emigrant outfit? (Objected to, as to the last part of the question, as incompetent and immaterial. Objection sustained.)" He was further interrogated, and the record made as follows: "The only object in putting those two pigs in the car was to make an emigrant outfit of it, was it not? (Objected to as incompetent, irrelevant, and immaterial. Sustained. Exception.)" In the examination of Taylor, witness for the company, the agent with whom Lawler made his contract for the car and the transportation of his property, the following interrogatory was propounded to him: "Was there anything said between you and the plaintiff about the reason why a man was permitted to go with an emigrant outfit?" The counsel for Lawler objected to the question as leading, which objection was sustained.

In the course of his testimony this witness testified as follows: "I cannot state why it was made out to Mr. Saltow, any more than the fact that it was the understanding he was to accompany the car." Then came the question, "From whom?" Counsel for Lawler here objected, and moved as follows: "Objected to, and plaintiff moves to strike out the last answer as to what was the understanding. (Sustained. Exception.)" It is alleged that the court erred in its action, in each and every of the above instances, for the reason that the evidence which would have appeared in the answers to the interrogatories to which objections were sustained would have been pertinent to the issue of the authority of Saltow from Lawler to go with the car, and have charge of it *en route*. Conceding that the evidence in each of the foregoing instances would have been competent and relevant, and have

had a bearing on any material issue in the case,—which, to say the least, is doubtful,—the error, if any, committed by the court, was cured, for in each particular the same evidence had been given in a prior answer of the witness, or was contained in an answer of the witness, or was contained in an answer to an interrogatory subsequently put to the same witness, and the plaintiff in error was not injured by the action of the court. *Jouasen v. Kennedy*, 39 Neb. 313.

In testifying to the value of various articles which were put in the car at Superior, and afterwards destroyed by fire, Lawler referred to a memorandum which he stated he made at Trinidad soon after the car was burned, and the immediate cause of his making it was his being asked by the agent of the company to give him a statement of the values of the articles burned.

Witness re-
freshing rec-
ollection.

Counsel for the company objected to the use of this memorandum by Lawler, which objection was overruled by the court, and the witness allowed to use it. This is assigned as error. By an examination of all the testimony of this witness in respect to this memorandum, we are satisfied that it was made soon after the occurrence of the burning of the car and property; that it was prepared by the witness at a time when he knew it to be a correct list, or as nearly correct as could be made, of the articles burned, and of their respective values; and that, after refreshing his memory from it, he was enabled to testify from his own knowledge as to the original facts, in so far as it is possible for a person to have any knowledge of such facts as were then being investigated. This brought it within the rule governing the allowance of the use of a memorandum by a witness to refresh his memory, and there was no error in the court permitting the witness to refer to the memorandum. See *Bank v. Bullong*, 24 Neb. 825; *Bonnet v. Glattfeldt*, 120 Ill. 166; 1 Greenl. Ev. §§ 436–439; 1 Whart. Ev. § 522, and note.

J. W. Lusk, one of the witnesses for the company, was a trainman in the employ of plaintiff in error in the route over which the car had passed just prior to the time it arrived at Pierceville, and was discovered to be on fire, and had been so employed, and on this route, for seven years, and testified that he was well acquainted with the road; knew its general direction, curves, cuts, etc.; and knew which way the wind was blowing on the day and night the train and car in question passed over the route,—and testified that the car containing Lawler's property was the thirteenth car in number, counting back from the engine pulling the train. This witness was asked a question (quoted

Expert testi-
mony.

below), to which counsel for Lawler objected, and the objection was sustained. The ruling is assigned as error.

The record is as follows: "You may state whether or not, from any point on the road between Dodge City and Pierceville, the road curves toward the south sufficiently to carry sparks from the engine to a car 13 cars back. (Objected to as calling for a conclusion of the witness. Objection sustained. Exception)."

The contention of counsel for plaintiff in error is that the testimony called for by the foregoing interrogatory would have been in the nature of expert testimony, and should have been admitted. We have no doubt of the ability of the witness, as a competent railroad or train man, or of his knowledge of the portion of the road of plaintiff in error over which the car was drawn immediately prior to its arrival in Pierceville, where it was found to be burning; but that he was competent to testify as an expert, and give as an opinion the distance to which, or direction in which, the wind, which blows across these western prairies will carry a spark of fire, and where it will deposit it, we cannot agree. This would be extending the doctrine of expert testimony far beyond any reasonable limits, and wandering far away in the mazes of uncertainty, speculation, and conjecture. It would be equivalent to asking the witness, and allowing him to testify, whether he had arrived at a conclusion as to a spark from the engine being the cause of the burning, which would clearly not be competent.

Doubtless it was competent for this witness to testify as he did in regard to the wind; the quarter to which and from which it was blowing; its direction relatively to the train; whether with or across or against its path; to state the trend of the line of the company's road, which way the train was running, and the position in the train of the car containing Lawler's property, in relation to that of the engine,—relate the facts within his knowledge. But it was not competent for him to give his conclusions drawn from such facts.

The jury being composed of men of ordinary knowledge and experience, when put in possession of the facts, were as capable of seeing what inferences should be drawn from them as the witness. Hence, his opinion was not competent. Rog. Exp. Test. p. 12, § 8.

Furthermore, this same witness was, prior to this time, asked the following question: "Now state, if you know, taking into consideration your experience, your knowledge, and the location of the burning car in that train, and the direction in which the train was running,—state whether or not

the car could have caught fire from the engine,"—to which he answered, and this without an objection. If it can be said that the evidence in reference to the sparks would have been, in even the remotest degree, competent or material, the plaintiff in error had received the full benefit of it in the answer to the question last quoted; and it was not error to exclude a repetition of it, although not asked for in the same words as in the prior interrogatory.

This is too well settled a rule to need any citations to support its statement.

The further allegations of error were made that the court refused to admit in evidence the contract releasing the company from liability for damage by fire, and further limiting
Limitations of liability. any recovery of damages to a valuation of the goods of five dollars per hundred-weight, and in ignoring the stipulations and provisions in contracts made between the parties, in the 2d, 3d, 4th, and 5th instructions given by the court.

The counsel for the company, in this branch of the case, enters into a very able discussion of the validity of the portion of section 4 of article 11 of the constitution of this state, which declares that "the liability of railroad corporations as common carriers shall not be limited;" contending that this provision is invalid, and of no effect, because it conflicts with, as he states it in his argument, "the exclusive rights of congress to regulate commerce between the states."

Whether he is right in his contention or not, or whether it is settled or established by the weight of authority, or sustained by the best reason, that the states cannot in any manner regulate or legislate so as to affect the portions of such contracts as the one in the case at bar, as would be governed by the above provision, is not necessarily to be determined in reaching a decision of this branch of the case. We think they can—and more rightfully—be decided and determined upon the ground of the invalidity of the contract, as an attempt to limit the common-law liability of the company under an agreement in its capacity as a common carrier.

In the case of *Railway Co. v. Witty*, 32 Neb. 275, a contract was entered into between the railroad company and Witty for the shipment of a horse from Henry, Ill., to Jansen, Neb.; and there was a stipulation contained therein by which the company was only liable for injuries to the horse occurring by reason of its gross negligence, and then for not to exceed the sum of \$100. This was held to be invalid under the rule of the common law. NORVAL, J., in the text of the opinion, states: "We do not doubt that a carrier may, by contract fairly entered into, limit in some respect its liability as an in-

surer, or its common-law liability, where the restriction imposed is reasonable. But, on grounds of public policy, the law has wisely prohibited a common carrier of freight from in any manner contracting against its own negligence.

"This doctrine was distinctly held and applied in *Railroad Co. v. Washburn*, 5 Neb. 117. GANTT, J., in the opinion, says: 'The common law fixes the degree of care and diligence due from railroad companies as common carriers, and a failure to exercise this care and diligence is negligence, without any legal distinction, as being gross or ordinary; and the better rule of law, sustained by the weight of authority, is that it is against the policy of the law to allow stipulations which will relieve the company from the exercise of that care and diligence, or which, in other words, will excuse them from negligence in the performance of that duty.'

Decisions are to be found which lay down a contrary doctrine, but the better reason, as well as the current of authority in this country, sustain the rule announced by this court in the case referred to,"—and cites in support of the doctrine announced *Railroad Co. v. Lockwood*, 17 Wall. 357; *Railway Co. v. Stevens*, 95 U.S. 655; *Shriver v. Railroad Co.*, 24 Minn. 506; *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Kiff v. Railroad Co.*, 32 Kan. 263; *Durgin v. Express Co.* (N. H.), 45 Am. & Eng. R. Cas. 325; *Morrison v. Construction Co.*, 44 Wis. 405; and a great many more, which we will not repeat here. See, also, *Railroad Co. v. Faylor*, 126 Ind. 126; *Ells v. Railroad Co.*, 52 Fed. Rep. 903; *Railroad Co. v. Ball*, 80 Tex. 602; *Railroad Co. v. Folts*, 3 Tex. Civ. App. 644; *Johnstone v. Railroad Co.*, 55 Am. & Eng. R. Cas. 346; *Baughman v. Railroad Co.* (Ky.), 21 S. W. 757; *Ambach v. Railroad Co.*, 30 Ohio Law J. 111.

On the subject of limitation as to the amount of damages, it is said in the foregoing opinion: "It is claimed that the limitation in the contract as to the amount of damages in case of loss or injury does not tend to exempt the carrier from liability for negligence. The authorities cited in brief of plaintiff in error so hold, but we are unable to draw such a distinction. If a carrier cannot, by stipulation, be relieved from liability from its negligence, it is equally clear, from the same reason, that it cannot, by contract with the shipper, limit the amount of damages resulting from such negligence. If the plaintiff in error can lawfully stipulate that the damage shall not exceed \$100, it could also contract that it should not be more than \$25, or any smaller sum, thereby practically relieving itself from all responsibility from injuries occasioned by its own negligence. That will be accomplished indirectly which it could not lawfully do directly. The proof fully

shows that the horse, when shipped, was worth not less than \$400, and to hold that the owner could only recover one-fourth that sum would be to exempt the carrier from a part of the liability assumed by it for injuries resulting from its own carelessness or negligence. This the law will not sanction." *Citing Morrison v. Construction Co.*, 44 Wis. 405; *Railroad Co. v. Simpson*, 30 Kan. 645, 16 Am. & Eng. R. Cas. 158; *Railroad Co. v. Abels*, 60 Miss. 1017; *Express Co. v. Blackman*, 28 Ohio St. 144; *Boehl v. Railroad Co.*, 44 Minn. 191, 45 Am. & Eng. R. Cas. 351.

The contract in the case at bar comes directly within the rule of the common law, as set forth in the case from which we have quoted; being somewhat stronger in its terms and provisions than the contract passed upon in that case, in that it absolutely exempts the company from any and all liability for damages caused by fire, etc., and places the value at five dollars per hundred-weight, without any reference to negligence on the part of the road in any degree, while the one in the case referred to made the company liable for gross negligence. We are satisfied that the provisions of the agreement between the railroad company and Lawler, whereby the limitation was attempted to be placed upon the liability of the road for loss or damage by fire, and valuing the goods, were void as against public policy.

There is another element which enters into, and is connected with, this branch of the case, which is embraced in the proposition that when the plaintiff in the court below had proved the delivery of the property to the railroad, and its failure to deliver it at its destination, it raised the presumption of negligence on the part of the company, and it devolved upon it to overcome such presumption by proof, and that it was not sufficient for it to show that the goods were destroyed by fire, but it must go further and show that there was no negligence on its part.

In *Railroad Co. v. Touart*, 97 Ala. 514, 55 Am. & Eng. R. Cas. 600, where the company was sued for failure to deliver five bales of cotton received by it as a common carrier, consigned to the plaintiff in the case, at Mobile, the defense was that the contract set out in the bill of lading contained a provision that the railroad was not liable "for loss or damage on any articles of property whatever, by fire or other casualty, while in transit, or while in depots or places of reception." The evidence disclosed that the cotton was destroyed by fire while in the depot warehouse in charge of the company. There was a verdict and judgment for the plaintiff for the value of the cotton, and on error to the supreme court the

court, in its opinion, says : " There are some principles of law applicable to the evidence which will dispose of the charges requested by the defendant. At common law a common carrier, to whom was intrusted goods for transportation, was liable for all losses not the result of the act of God, the public enemy, or the party complaining. It may be safely said, as a conclusion from numerous decisions, that by special contract a common carrier may limit its liability, and protect himself against losses by accident, and losses which are not the result of fault or negligence on his part, or that of his employés. After showing the delivery of the cotton, and its consignment to plaintiff at Mobile, and the failure by the common carrier (defendant) to deliver the same within a reasonable time, the plaintiff's case was made out, and he was entitled to recover. At common law, nothing but the act of God, the common enemy, or plaintiff's own fault, could relieve the defendant of the case made against him by such proof, and the burden rested on the common carrier to prove his defense. His responsibility as a common carrier is the same now as at common law, except so far as limited by special contract. If the loss resulted from some cause excepted by the contract, the carrier must plead the exception specially ; and his plea, to present a defense, must aver that the excepted cause was not the result of negligence on his part. It is not enough to sustain this plea to show that the loss was the result of a cause excepted by the contract. He must go further, and affirmatively show that the cause resulted without fault on his part. The contract, as framed, does not relieve him of this burden."

In Greenleaf on Evidence (volume 2, § 219), we find the following : " In all cases of loss by a common carrier, the burden of proof is on him to show that the loss was occasioned by the act of God, or by public enemies. And, if the acceptance of the goods was special, the burden of proof is still on the carrier to show, not only that the cause of the loss was within the terms of the exception, but also that there was on his part no negligence, or want of due care."

The case of *Ryan v. Railway Co.*, 65 Tex. 13, 23 Am. & Eng. R. Cas. 703, was an action against the company for the value of goods which it was alleged were not delivered at their destination, but were converted by the company. The defense was that the goods were burned without any negligence on the part of the road. The bill of lading exempted the company from liability for loss by fire. The evidence showed that the goods were destroyed by fire while in the possession of the company, at night, while in the cars at the depot, and before the transportation was completed. It was held " that it devolved on the carrier to show that the fire did not occur through its negli-

gence," and in the body of the opinion it was stated: "In a suit of this character, it is sufficient for the plaintiff to aver and prove that the goods were delivered to the carrier, and that they have not been received at their point of destination. This is said to make a *prima facie* case of negligence, which the carrier must rebut, or the plaintiff will recover. He may rebut it only in one way, and that is by showing that the goods were lost by one of the exceptions known to the common law, or one of the special exceptions reserved in the contract with the shipper. If by neither a common-law exception, nor one especially reserved, he is exonerated, he must show that the loss happened without negligence on his part. Take, for instance, the exception of loss by fire. The contract recites merely that if the loss occurs by fire the carrier shall not be liable; but the law incorporates the words, 'without negligence on the part of the carrier.' What the law inserts is as much a part of the contract as what is expressly written in it. When, therefore, the plaintiff makes out a *prima facie* case of negligence, by proving that the goods were not delivered, is this case rebutted by proof that they were not delivered by reason of a fact which may have existed, and the carrier still have been negligent? If so, he can stop with the presumption of negligence arising from non-delivery, still resting upon him, and call upon his adversary to further strengthen his own *prima facie* case, or it shall lose this character altogether. This would be against all rules of evidence." See *Spellman v. Transit Co.*, 36 Neb. 890; *Banking Co. v. Hasselkus*, 91 Ga. 382, 55 Am. & Eng. R. Cas. 586; *Valley Co. v. Holmes*, 14 Ky. Law Rep. 853; *Missouri Pac. Ry. Co. v. China Manuf'g Co.*, 79 Tex. 26; *Browning v. Transportation Co.*, 78 Wis. 391; 4 Lawson, Rights, Rem. & Pr. § 1860.

In the case at bar the company attempted to show that fire was occasioned by a lighted coal-oil lantern left in the car by Saltow, and that Saltow was in charge of the car for Lawler; but these were disputed points in the testimony, and, as we have once before stated, the jury evidently determined them in Lawler's favor, and the evidence was sufficient to sustain such a finding. Further than this, there was very little or no attempt on the part of the company to prove anything in reference to negligence, or the lack of it, or to explain the cause of the loss, or the occasion of the fire which destroyed Lawler's goods. We are fully satisfied that the court below did not err on this branch of the case.

There is but one more error of those assigned which is argued in the brief filed in behalf of plaintiff in error, which is that the court refused to instruct the jury that "the plaintiff cannot recover in this case if the fire which destroyed his

property resulted from any act of the plaintiff, or his servant or agent, whether such act was such as to constitute negligence or not." An examination of the **Instructions.** instructions given to the jury convinces us that they were fully instructed on the points covered by the instruction requested by plaintiff in error, above quoted, and that there was no error in refusing to give it. This disposes of all the assignments of error discussed in the brief of counsel for plaintiff in error; and we conclude that there were no rulings of the court below, complained of, which were erroneous, or call for a reversal of the case.

The judgment of the lower court is affirmed.

Action for Failure to Deliver Goods.—See *Baltimore & Ohio R. Co. v. O'Donnell* (Ohio), 55 Am. & Eng. R. Cas. 664, and note 674.

Non-delivery of Freight—Measure of Damages.—See *Echols v. Louisville & Nashville R. Co.* (Ala.), 42 Am. & Eng. R. Cas. 454, and note 455.

Limitation of Liability by Carrier.—See *Merchants' Dispatch Transportation Co. v. Furthmann*, *ante*, p. 145, and note, 150.

WEHMANN

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE R. CO.

(*Minnesota Supreme Court, June 22, 1894.*)

Carrier Constituting Part of Continuous Line—Liabilities.—Where two or more common carriers, whose lines form a continuous line, establish joint or through tariffs of rates, they do not, by that alone, become joint carriers, nor any one of them become liable for the defaults of any other, but the carrier receiving goods for carriage over the continuous line becomes agent for each to contract for carriage over their respective lines.

Same—Duties.—Under such an arrangement it is the duty of the carrier receiving goods for carriage over the continuous line to carry them to the end of its line, and there deliver them to the next carrier to which attaches the duty to receive and carry and deliver them to the next carrier, and so on till they reach their destination.

Same—Liabilities.—The liability of each carrier continues until it has carried the goods to the end of its line, and delivered them to the next carrier, or given it notice of their arrival, and a reasonable time has elapsed for it to receive them.

Exemption of Carrier from Liability—Necessity of Consideration.—A stipulation that a common carrier shall be exempt from any of its common-law liability needs a consideration to make it binding.

Same—What Constitutes Consideration—Receipt of Goods.—The mere receipt of the goods and undertaking to carry is not a sufficient consideration.

Same—Abatement or Concession of Rates.—No abatement or concession in rates will be presumed as such consideration, where such abatement is forbidden by law.

APPEAL from Hennepin county district court.

Alfred H. Bright, for appellant.

Flannery & Cooke, for respondent.

GILFILLAN, C.J.—The defendant had a connection with the Lehigh Valley Transportation Company and the Lehigh Valley Railroad Company, forming a continuous line from Minneapolis to various points in the east; the defendant's part of such continuous line being by rail from Minneapolis to Gladstone, Mich., the transportation company's part by boat from Gladstone to Buffalo, N. Y., and the Lehigh Valley Railroad Company's from Buffalo by rail to various points in the east, among them to Philadelphia. The three carriers had established and published joint or through tariffs of rates for freight carriage from Minneapolis to the various points in the east to which the continuous line extended, so as to come within the provisions of 25 Stat. c. 382.

Plaintiffs shipped with defendant, at Minneapolis, a carload of flour, consigned to a party named in the bill of lading at Philadelphia. It arrived at Gladstone November 21st, was put in defendant's warehouse at that place, where it remained till November 29th, when it was destroyed by fire. There was no evidence on the trial that notice of the arrival of the flour at Gladstone was given to the transportation company or to the plaintiff.

We do not think the establishing of joint or through rates in such cases of itself makes the different carriers in the continuous line joint carriers for the line, or makes any one of the carriers liable for the defaults of any of the others. At the most, the receiving carrier would be agent for each of the others to contract for carriage over their respective lines, so as to create a duty on each to receive goods at the point where the preceding carrier's line ends, and carry them to the end of its part of the line, and deliver them to the carrier next beyond.

The bill of lading executed by defendant to plaintiff cannot be construed to be a contract on its own behalf to carry from Minneapolis to Philadelphia, or anything more than a contract to carry over its own line to Gladstone, and there deliver to the transportation company. Under such an arrangement for a continuous line and joint or through rates it is the duty of the first or receiving carrier, on receiving goods for carriage to any point on the continuous line beyond its own line to

Status of
carriers con-
stituting con-
tinuous line.

carry them with due despatch to the end of its line, and there deliver them to the next carrier, whose duty it is to receive and carry them with due despatch to their place of destination, and deliver them to the owner or consignee; or, if the place of destination be beyond its own line, to deliver them at the end of its line to the next carrier, to which a like duty will then attach.

In such case, the owner, by delivering his goods to be carried through, does not contemplate nor make a contract for storage. His contract is for carriage, and, until the goods reach their final destination, he has a right to a continuous carrier's duty and responsibility, which cannot, without his consent, be changed to the duty and responsibility of a warehouseman, however convenient that might be for the carrier. And, from the time its duty of carrier attaches, any carrier in the line can discharge itself of the responsibility as such only by performing its whole duty by carrying the goods, and delivering them to the next carrier if they are to go beyond its line. The responsibility of the preceding carrier does not cease until the responsibility of the next one attaches. Any other rule would make any arrangement for a continuous line and through rates a snare to the public. The liability of the defendant is to be determined as though its contract had been to carry to Gladstone, and there deliver to any consignee.

There is no express evidence on the point, but under the arrangement for a continuous line, it is to be presumed that the transportation company had an agent at that point, to whom the flour might have been delivered, and to whom notice of its arrival might have been given; and that the defendant knew who that agent was. When the consignee resides at the place of destination, or has an agent there, authorized to receive the goods, and that is known to the carrier, the latter's liability as carrier does not end, and the liability become that of a warehouseman, until the lapse, after notice to such consignee or agent that the goods have arrived, of a reasonable time to receive and remove them. *Derosia v. Railroad Co.*, 18 Minn. 133 (Gil. 119); *Pinney v. Railroad Co.*, 19 Minn. 251 (Gil. 211).

As the flour was not delivered to the transportation company, nor notice of its arrival given to its agent, so that its responsibility as carrier might attach, the responsibility of defendant as carrier had not ended at the time of the fire, unless by virtue of a clause in the bill of lading in these words: "It being further expressly agreed that this company assumes no liability, and it is not to be held responsible as common carriers, for any

Exemption of
liability
necessity of
consideration.

loss or injury to said property after its arrival at its warehouse aforesaid, or for any loss or damages thereto, or any delay in transportation or delivery thereof, by any connecting or succeeding carrier." Conceding that, because this was a shipment for carriage beyond the limits of the state, the statutes of the state do not apply, and that the validity of the clause is to be determined by the principles of the common law, then the question arises, was there a consideration to support it? Such a clause, to be of force, must stand as a contract between the shipper and the carrier, and, as in the case of all contracts, there must be a consideration for it. One exercising the employment of a common carrier of goods is bound to receive and carry such (within the class of goods that he carries) as are tendered to him for the purposes, and, in the absence of special contract, to carry them with the full

Receipt of goods. common-law liability of a common carrier. His receipt of and undertaking to carry them, being a duty imposed on him by law, is not a consideration to support such special contract. There must be some other. That is generally furnished by some concession in rates.

And, where the agreement is set forth in the contract for carriage, it would probably be presumed that, in a case where parties could make any, there was some such concession as a consideration for relieving the carrier of part of his common-law liability. But in such a case as this, any abatement of rates is forbidden by act of congress, and therefore none can be presumed. The tariff of joint rates in the case makes no mention of any limitation of liability. They are to be taken, therefore, as rates established for carriage with full common carrier's liability; and under the act of congress no abatement could be made to support a contract for a limited liability. The clause is void for want of a consideration to support it.

Concession in rates.

Order affirmed.

COLLINS and BUCK, JJ., took no part in the decision.

Limitation of Liability by Carrier.—See Merchants' Dispatch Transportation Co. v. Furthmann, *ante*, p. 145, and note, 150.

Connecting Carriers.—See Palmer v. Atchison, Topeka and Santa Fe R. Co. (Cal.), *ante*, p. 235, and note, 242.

WILLOCK

v.

PENNSYLVANIA R. CO.

(Pennsylvania Supreme Court, January 21, 1895.)

Perils as to which Common Carrier is an Insurer.—A railroad company as a common carrier is an insurer against such perils as it is its duty to provide against, and among these are such as arise from the use of defective or inadequate instruments of carriage, and from the employment of incompetent, negligent, or criminal servants.

Nature of Stipulations Relieving Carrier from Liability Because of Failure to Disclose Value or Character of Goods Shipped.—Stipulations made for the purpose of relieving a carrier from liability because of failure of the shipper to disclose the actual nature of goods, the value or the like to the carrier, relieve him not from the duty to exercise care and diligence in the transportation of the goods, but from the consequences of the failure of the shipper to advise him fully of the facts and circumstances material to the contract, the suppression of which is in effect a fraud upon him.

Exemption from Liability by Carrier—Rule in Pennsylvania.—A carrier cannot stipulate for protection in the violation of his contract as carrier, in disregard of a settled rule of public policy, and the rule in this regard is *stare decisis* in Pennsylvania.

Same—Validity of Stipulation Requiring Insurance for Benefit of Carrier.—A railroad company inserted in a bill of lading for goods received by it, a stipulation that the owner, shipper, and consignee severally should cause the goods to be fully and sufficiently insured, and that in case of loss, the carrier should have the benefit of such insurance if such loss should occur "from any cause which shall be held to render this line or any of its agents liable therefor." No insurance was effected and a loss occurred. *Held*, that the stipulation was void, and that the shipper could recover, notwithstanding the failure to insure.

APPEAL from Allegheny county common pleas.

William Scott and Geo. B. Gordon, for appellant.

Young & Trent, for appellee.

WILLIAMS, J.—Who shall be deemed a common carrier, and what are the nature and extent of his undertaking, are questions that were settled centuries ago upon common-law principles. A common carrier is bound to employ safe and sufficient means of carriage, trustworthy and competent servants, and by himself or his agent to exercise an intelligent supervision over the system of carriage which he employs. He is therefore to all intents and purposes an insurer against such perils of transportation as it is his duty to provide against; and these

Duties of common carrier considered.

include all the perils of the journey, except such as arise from "the act of God or the king's enemies."

Our forefathers brought this definition of the duties of a common carrier with them when they came to this continent, and its outlines remain substantially the same to this day.

Some limitations upon his common-law liabilities have been sustained to protect the carrier against unjust and fraudulent

Perils as to which carrier is insurer. claims on the part of customers, but the measure of care due from him to those whom he serves has not been abated in the slightest degree. He is

still held to be an insurer against such perils as it is his duty to provide against, and among these are such as arise from the use of defective or inadequate instruments of carriage, and from the employment of incompetent, negligent, or criminal servants. *Farnham v. Railroad Co.*, 55 Pa. St. 53.

What are commonly spoken of as limitations of the liability of the carrier, and have been upheld by the courts of this

Limitation of liability. state as such, are, when carefully considered, undertakings of the shipper implied from the nature of the contract, and enforced against him at the instance of the carrier. Thus a stipulation that the

carrier shall not be liable to the shipper for the loss of certain packages in a greater sum than that named in the receipt or bill of lading, unless the actual value of the package was fully disclosed to the carrier when it was delivered to him, so that he might know the amount of risk involved and charge accordingly, has been upheld, because good faith on the part of the shipper requires such full disclosure by him. So, also, if the contents of a package are perishable, or easily broken, or explosive, so that the danger of loss is increased, and the exercise of an unusual degree of care is made necessary, good faith requires the shipper to make the facts known to the carrier; and a failure to do so ought to affect the extent, and in some cases the right, of recovery for the loss of goods so shipped.

The carrier is relieved in these cases, not from the duty to exercise care and diligence in the transportation of his custo-

Failure to disclose value or character of goods. mer's goods, but from the consequences of the failure of the shipper to advise him fully of facts, and circumstances material to the contract the suppression of which is in effect a fraud upon him. His

obligations as a common carrier are not reduced. He is bound to the exercise of great care by the nature of his undertaking. He must not be negligent. It is against public policy that he should be. It is also a violation of his contract, which is to carry safely. A stipulation that is intended to protect him in the violation of his contract as a carrier, and in disre-

garding a settled rule of public policy, will not be sustained. The cases in which this doctrine is recognized and applied in this state are very numerous. Among them may be named the following: Beckman v. Shouse, 5 Rawle, 179; Bingham v. Rogers, 6 Watts & S. 495; Laing v. Colder, 8 Pa. St. 479; Goldey v. Railroad Co., 30 Pa. St. 242; Powell v. Railroad Co., 32 Pa. St. 414; Express Co. v. Sands, 55 Pa. St. 140; Railroad Co. v. Miller, 87 Pa. St. 395; Grogan v. Express Co., 114 Pa. St. 523; 30 Am. & Eng. R. Cas. 9; Railroad Co. v. Raiordon, 119 Pa. St. 577; Telegraph Co. v. Stevenson, 128 Pa. St. 442; Phoenix Pot Works v. Pittsburgh & L. E. R. Co., 139 Pa. St. 284; Buck v. Railroad Co., 150 Pa. St. 171.

It is a sufficient answer to an argument in favor of changing the rule in Pennsylvania, and permitting carriers to stipulate for a release from the consequences of their own negligence or fraud, that the question is not an open one. It has been settled by the cases cited, and many others, and we are bound by the rule of *stare decisis*.

Rule in Pennsylvania.

The attempt to overturn the common-law doctrine fixing the liability of carriers was made in England by act of parliament. The result is, after several statutes upon the subject, that the carrier may make a contract limiting his liability on two conditions. The first is that the contract be actually signed by the shipper; the second is that the courts shall adjudge the limitation to be "just and reasonable." This works no substantial change in the law. It makes a contract for carriage of persons or property tripartite. The carrier and the shipper are the ostensible parties, but the public, as represented by the courts of law, is the third party, and may refuse its consent to stipulations on which carrier and shipper have agreed. When such a contract comes before the courts, the question is not, what terms have the parties incorporated into their agreement? but are the terms so incorporated "just and reasonable," so that they ought on grounds of public policy to be enforced? In determining this question, the courts have been constrained to apply common-law principles, and hold that to be just or unjust which was so held at common law.

Thus, in *McManus v. Railway Co.*, 4 Hurl. & N. 327, the contract provided that the live stock shipped over the defendant's railroad should be carried at the risk of the owner, and that the company should in no case be liable for any loss or injury sustained. The contract was signed by the shipper, but the court held it to be both unjust and unreasonable, and refused to enforce it.

In *Kirby v. Railway Co.*, 18 Law T. (N. S.) 658, the contract provided that the carrier should not be liable for injury

to the goods shipped, occasioned by delay, no matter what the cause of the delay might be. The courts, representing the public—the third party to the agreement—declined to give assent, and held the provision relieving the carrier from the consequences of his own negligence to be unjust and unreasonable.

Still nearer to the question in the case before us is *Peek v. Railway Co.*, 10 H. L. Cas. 473. The carrier in that case had a contract with the shipper containing a stipulation that he should not be liable for loss of the goods, unless their value was declared at the time of the delivery of the goods to him, and they were then insured to their full value by the shipper. This was held to be neither just nor reasonable, and its enforcement was refused.

The courts of England have thus held, in substance, that the public have a greater interest in the transportation of persons and property than any individual shipper, and that public policy requires of a common carrier the exercise of constant care over his vehicles or means of transportation, and over his servants and employés in charge of them. They further hold that it is against the public good that he should be allowed to contract for immunity from the consequences of his own negligence or fraud, or the negligence or fraud of his employés, and that stipulations to that effect are incapable of enforcement, because unjust and unreasonable.

The supreme court of the United States holds to the same doctrine upon this subject as the courts of Pennsylvania. *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.*, 129 U. S. 397, 37 Am. & Eng. R. Cas. 681.

The public is interested in securing the highest measure of safety in the transportation of passengers and goods, and to this end public policy requires that common carriers be held to the highest measure of care in the conduct of their business. Greenhood, in his treatise on Public Policy (page 513), says: "It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment, and to assert that he may do so seems almost a contradiction in terms." The carrier and the shipper do not stand on equal terms. The latter cannot afford to refuse that which the carrier demands as a condition to the transportation of his goods, and, in ninety-nine cases out of every hundred, if he does so refuse he will find himself discriminated against until his business is ruined, and he has nothing left to ship. The rule that stipulations, insisted on by carriers or other persons who stand in such a

position towards their customers as enables them to compel compliance with their demands or destroy their customer's business, should be judged of by their fairness and to be held void whenever they are unreasonable or oppressive, is one of very general acceptance. Public policy compels its acceptance in all civilized countries.

The learned counsel for the appellant cite *Phoenix Ins. Co. v. Erie & W. Transp. Co.*, 117 U. S. 312, 11 Am. & Eng. Corp. Cas. 597, as tending to sustain their contention. But an examination of that case shows that it was begun by libel filed by the insurance company asking subrogation to the rights of the shipper against the carrier. The first question to be determined was, therefore, what could the shipper recover upon the facts of that case? He had contracted that any insurance he might obtain should inure to the benefit of the carrier. He obtained insurance on the goods shipped, suffered a loss, and was paid the insurance money. The question presented on these facts was whether the right of the shipper to recover against the carrier was not extinguished to the extent to which his loss had been paid by the insurer. If so, subrogation must necessarily be refused, and it was refused for this reason.

This point was elaborated in *Providence Ins. Co. v. Morse*, 150 U. S. 99, in which it was said that, in case of loss, the carrier is primarily liable to the shipper, and the position of an insurer is substantially that of a surety. The insurer can recover, therefore, after payment of a loss, by subrogation to the rights of the shipper, and upon no other ground; so that whatever amounts to an extinguishment of the right of action of the shipper against the carrier must defeat the insurer's right to subrogation. The general proposition, that the surety who pays the debt of his principal succeeds only to the rights of the creditor whom he pays, is beyond all doubt; and in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* it was held to be applicable to contracts that, as we have seen, are tripartite, having the public as a third, though unnamed, party.

In the case at bar the carrier inserted in its bill of lading a stipulation that the owner, shipper, and consignee severally shall cause the goods to be fully and sufficiently insured, and that in case of loss the carrier shall have the benefit of such insurance if such loss "shall occur from any cause which shall be held to render this line or any of its agents liable therefor." No insurance was effected. A loss occurred as the result of collision of two of the carrier's trains. The shipper sues to recover the amount of his loss. The only defense set up is under the condition in the bill of lading; and the question

Stipulation
requiring in-
surance for
carrier's
benefit.

raised is, will the courts compel the performance of a contract between shipper and carrier requiring the shipper to protect the carrier against the consequences of its own negligence?

There is no doubt about the carrier's having an insurable interest in the goods, or about his right to protect himself from loss by procuring a policy of insurance for that purpose; but the question here presented is, can he compel the shipper to insure the goods for his benefit? If so, he can compel the shipper to release him entirely, and so stipulate for complete immunity from the consequences of the negligence and fraud of himself or of his servants and employés. This, in the language of the English courts, would be "unjust and unreasonable." In the language of our own cases, it would be "contrary to public policy." The thought is the same. Our own mode of expressing it is preferable, in this: that it suggests the reason on which the rule rests.

The judgment is affirmed.

Rights, Duties and Liabilities of Common Carriers.—See notes, 35 Am. & Eng. R. Cas., pages, 495, 518, 527, 531, 536, 554, 565, 571, 575, 601, 617, 624, 627, 629, 646, 650, 655, 662, 671.

Limitation of Liability by Carrier.—See *Merchants' Despatch Transportation Co. v. Furthmann*, *ante*, p. 145, and note, 150.

SOUTHARD.

v.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE R. CO.

(*Minnesota Supreme Court, March 5th, 1895.*)

Construction of Bill of Lading Issued by Traffic Association—Liability of one Carrier for Default or Negligence of Another.—A traffic association, composed of several carriers, issued a through bill of lading for freight (flour) from Minneapolis to Boston, Mass. (at least), containing a stipulation that in case of loss, detriment, or damage to the flour, whereby liability should be incurred, the carrier alone should be liable in whose actual custody it should be at the time of the loss. *Held*, that the real meaning of the language was that one carrier should not be held liable or responsible for the loss or damage of another.

Same—Liability of Carrier for Failure of Connecting Line to Receive Goods.—*Held* further, that, under the terms of the bill of lading the shipper was entitled to an uninterrupted, continuous carrier's duty from Minneapolis to Boston, and that the clause in question made the carrier who had transported the freight to a point where another was to assume custody and control a guarantor or surety that the latter would receive, and also made

it liable as an actual custodian, notwithstanding the flour had been offered to such connecting carrier, and it had unreasonably neglected or refused to receive it.

Validity of Stipulation Limiting Liability of Carrier—Consideration.—From unqualified and unrestricted receipts issued by defendant when the flour was delivered to it in car-load lots at Minneapolis, and the bills of lading issued subsequently in lieu of said receipts, it is *held* that the presumption arose that there was no consideration for a stipulation in the bills whereby the association attempted to relieve itself from a carrier's liability in case the flour was lost in transit, by fire or other casualty, and therefore such stipulation was not binding.

Right of Insurance Company which has Paid Loss to be Subrogated to Rights of Insured as against the Shipper.—An insurance company, which by the express terms of its policy has been absolved from liability, and is under no legal obligation to pay a loss, because of a stipulation contained in a bill of lading of the insured property, whereby the carrier liable for the loss is to have the benefit of such insurance, has the right to impose as terms of payment for such loss that it have the unqualified absolute right to proceed against the carrier primarily liable to the insured. Such carrier is not in a situation to complain or object or to demand that he have the benefit of the payment.

APPEAL from Ramsey county district court.

A. H. Bright and Munn, Boyesen & Thygeson, for appellant.
Warner, Richardson & Lawrence, for respondent.

COLLINS, J.—Counsel for appellant, defendant railway company, when arguing this cause, laid down four distinct propositions as embracing and covering all questions raised by them on appeal.

It was first urged that, as soon as defendant had properly conveyed the flour in question from its shipping point, Minneapolis, Minn., to the easterly terminus of its line of railway, Gladstone, Mich., and had there Case stated. tendered it to the next connecting carrier, the Lehigh Valley Transportation Company, and a reasonable time had elapsed for its reception by the latter, defendant's liability as a common carrier ceased, and that of the Lehigh Company attached. From that time on the only liability resting on defendant, according to counsel's views, was that of a warehouseman.

The second proposition, dependent upon the soundness of the first, was that, as defendant's liability at the time of the fire was only that of a warehouseman, the burden of proof was on plaintiff to show that the flour was destroyed through defendant's negligence.

The third was that, by reason of a certain clause in the bill of lading or contract for carriage, of which special mention will be made hereinafter, the defendant had been exempted from any liability for loss or damage to the flour occurring without its fault or neglect.

The fourth proposition was also based upon a clause in the

bill of lading, it being claimed that by its terms the defendant carrier was entitled to any insurance effected upon the flour by or in favor of the consignee. The flour having been fully insured, and the insurance company, said by defendant's counsel to be the real plaintiff, having paid the amount of such insurance, it is contended that defendant is entitled to the benefit of such payment.

1. The flour destroyed was part of a much larger quantity delivered to defendant in car-load lots on divers days between October 17 and November 4, 1891. As these car-load lots reached Gladstone the flour was removed from the cars to defendant's warehouse on the dock, there to await the arrival of a vessel belonging to the Lehigh Valley Transportation Company, the next connecting carrier, and these vessels came quite infrequently and irregularly. The result was that the flour, which was in sacks, was not shipped and did not go forward from Gladstone in the order of its arrival there, and a part of every shipment from Minneapolis was destroyed by the fire.

In the bill of lading it was stipulated "that, in case of any loss, detriment, or damage done to or sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of such loss, detriment, or damage," and it is on this stipulation, with a certain finding of the trial court, that defendant's counsel rest their first proposition. The finding was that on the arrival of the flour at Gladstone it was offered by defendant to the Lehigh Valley Transportation Company for shipment under the through traffic arrangements between defendant and the company and other connecting carriers, but that prior to and down to the time of the fire—about 10 days after the last car-load reached Gladstone—the transportation company had neglected and refused to receive or transport it; that thereupon defendant deposited the flour in its warehouse, on the dock at which the company's vessels landed, and thereafter continued ready to make delivery. The transportation company had no agent or representative at Gladstone, and all freight to be shipped had to be brought to the attention of the officers of the vessels as they came into port; and it is contended by plaintiff's counsel that as the evidence conclusively shows that none of the company's vessels came into port during the 10 days prior to the fire, the finding was wholly unsupported by evidence.

We need not inquire as to this, for as we construe the stipulation above quoted, the finding is of no value to defendant,

as it was not relieved from liability or responsibility as a common carrier by reason of the neglect or refusal of one of its associates in the traffic arrangement to receive and forward the property. Under the terms of the bill of lading the shipper of freight was entitled to an uninterrupted continuous carrier's duty, at least from Minneapolis to Boston; and the clause in reference to loss, detriment, or damage while in transit cannot be construed as absolving a carrier who actually has the custody of the property from his common-law duty and obligations, because one of his associates in an arrangement for through shipment has unreasonably neglected or refused to receive and forward, for such a construction would permit loss to occur while freight was being transported, as this was, by several carriers, under a through-traffic agreement, without a carrier's duty resting upon them at all times. The carrier in possession could escape liability because he had tendered the goods to another, and the latter could escape because he had neglected and refused to become an actual custodian. The shipper would have no means of knowing just where the liability of the carrier, as such, attached, or just when it ended. The fact that part of the flour first shipped from Minneapolis was burned illustrates this.

The language in question must be construed as an affirmation or guaranty that there shall continually be a carrier in actual custody, and that connecting carriers will receive at the proper time and place. It makes the carrier who has transported the goods to a point where another is to assume custody and control a surety that the latter will receive. As between the two, we need not determine what the relations may be, but as between the carrier who actually retains custody and the shipper the duty and liability of the former continues. He has not become a warehouseman by the refusal and neglect of another carrier. The real meaning of the language in question is simply that one carrier shall not be held liable or responsible for the loss or damage done by another.

It may be well to remark that the bill of lading considered in the case of *Wehmann v. This Defendant* (Minn.), 59 N. W. 546, a controversy growing out of the same fire, differed essentially from that now before us, which is for through carriage, and particularly that it contained no language like that just disposed of.

2. Holding, as we do, that the refusal and neglect of the transportation company did not release the defendant from its duties and obligations as a common carrier, renders it unnecessary for us to discuss the counsel's second proposition.

3. In the bills of lading was a stipulation that the joint car-

rier, the "West-shore Line and its connections, which received
 said property, shall not be liable for * * * loss or
 limitation of damage on any article or property whatever, by fire
 liability. or other casualty while in transit, or while in de-
 pots or places of transshipment," etc.

By means of this language the carriers made a direct at-
 tempt to relieve themselves of their common-law duty and
 liability, and on this stipulation counsel base their third prop-
 osition.

As the flour was delivered in car-load lots to defendant, it
 issued to the shipper its memorandum receipts for the same.
 These receipts were unqualified, and expressed the considera-
 tion for the services to be rendered; that is, the rate per 100
 pounds for which the flour was to be transported from Minne-
 apolis to various points in Great Britain. Afterwards these
 receipts were canceled, and the bills of lading issued in lieu
 thereof. As the receipts were unqualified in form, they did
 not contain the language just quoted, nor that previously
 quoted, limiting and restricting the carrier's duty and obliga-
 tion in case of loss, detriment, or damage or destruction by
 fire or other casualty. Taking the receipts and the bills of
 lading together, the presumption arises that there was no con-
 sideration whatever for the exemption from the common-law
 liability so plainly attempted in the bills. In fact, taking
 them together, it appears that a contract was first made, evi-
 denced by the receipts, whereby the West-shore Line under-
 took the transportation of the flour unqualifiedly, and without
 any limitation upon its liability as a carrier, at a certain rate
 per 100 pounds, and then, taking up its receipts, issued the
 bills of lading, whereby it stipulated for transportation at the
 same rate, but exempted itself from the duty and obligation
 which had before existed. The rate was not reduced on ac-
 count of the exemption found in the bills. No further burden
 was imposed upon the carrier, and no advantage, legal or oth-
 erwise, obtained by the consignor. The stipulation needed a con-
 sideration to make it binding. *Wehmann v. This Defendant,*
supra. And evidently there was none for the limitations im-
 posed by the bills of lading.

4. In the bills of lading—although not in the receipts, we
 notice—it was stipulated that in case of loss, detriment, or
 damage to the flour while in transit the carrier lia-
 stipulation ble for such loss, detriment, or damage should
 for insurance have the full benefit of any insurance which might
 —Subroga- have been effected on the same. In the policy of
 tion. insurance issued to the consignor—some time prior to the deliv-
 ery of the flour to the defendant—for the benefit of all parties
 concerned, was a condition "that, in case any agreement be

made by the insured with any carrier by which such carrier stipulates to have, in case of any loss for which he may be liable, the benefit of this insurance, then, and in that event, the insurers shall be discharged of any liability for such loss hereunder ;" so that, by reason of the stipulation in the bills of lading, the insurance company had been discharged and released from any liability on account of this loss. It had a complete defense to an action brought on the policy to recover for the value of the flour. The situation then was that the defendant had become primarily liable for the amount of the loss, while the insurance company had been released and absolved from liability under its policy.

This is conceded by defendant's counsel, but it is urged that the objection and defense were waived, and that the subsequent transactions between the owners of the flour and the insurance company amounted to an election on the part of the latter to make unconditional payment, and that, therefore, defendant is entitled to the benefit of the same by reason of the stipulation in the carriage contracts.

We do not consider the transaction between the insurance company and the insured as indicating an intention on the part of the former to waive the condition of the policy, or as showing an election on its part to make unconditional payment. Such intent or election was expressly repelled by its acts. It absolutely refused to treat with the owners of the flour, except conditionally, and in a manner which would prevent an imputation to it of any such intent or election. But it is clear that the insurance company, absolved from payment as it was, and under no legal obligation to pay, had the right to exact such terms with respect to the party primarily liable to the insured as it chose as a condition of payment. *Inman v. Railway Co.*, 129 U. S. 128, 9 Sup. Ct. 249. This is no new proposition of law, and is distinctly recognized in one of the cases relied upon by defendant's counsel. *Lancaster Mills v. Merchants' Cotton Press Co.*, 89 Tenn. 1, 14 S. W. 317. So that, if we concede the transaction as amounting to payment, it was upon terms which the insurer had a legal right to impose, that it should have the unqualified absolute right to proceed against the party primarily liable to the insured.

It follows that defendant, primarily liable, is not in a situation to complain or to object or to demand that it have the benefit of the payment.

Order affirmed.

Connecting Lines—Rights and Liabilities.—See *Palmer v. Atchison, Topeka & Santa Fe R. Co.*, *ante* 235, and note p. 242.

Limitation of Liability by Carrier.—See *Merchants' Despatch Transportation Co. v. Furthmann*, *ante* p. 145, and note 150.

Subrogation of Insurance Company.—See *Fayerweather v. Phoenix Insurance Co.* (N. Y.), 42 Am. & Eng. R. Cas. 337, and note 840.

Action by Insurers who had Settled with Shippers to be Subrogated to Rights of Carrier and Compress Company, which had Insured Cotton which was in Charge of the Latter at the time of its Destruction by Fire—Removal of Causes.—In *Merchants' Cotton Press & S. Co. v. Insurance Company of North America* (151 U. S. 368), it appeared that by agreement with a railroad company, a cotton-press company was to receive and compress cotton, and to insure the same for the benefit of the railroad company, or of the owners of such cotton; that the compress company was to give receipts, and that the railroad company was to issue bills of lading in exchange therefor; that cotton thus deposited with the compress company in accordance with this agreement, was destroyed by fire; that the compress company had insured the cotton in its own name, but to an amount less than its value; that each policy stated that it was issued for the benefit of the railroad company or of the owners; that the various owners of the cotton further insured their respective interests in other insurance companies styled in the case the marine companies, and that after the loss the marine companies settled with the owners. It further appeared that in an action brought in the Tennessee state courts the supreme court of that state determined (89 Tennessee 1, 90 Tennessee 306) that the marine companies which had settled were entitled to be subrogated to the rights of the owners or consignees against the railroad company under its bills of lading, and that the latter was entitled to have the insurance which had been taken out by the compress company collected for its benefit; that thereafter the railroad company, not being a party to those suits, the marine companies filed their bill in Tennessee against the compress company, the persons who had insured the cotton in its behalf, and the railroad company, to reach the insurance taken out by the compress company for the benefit of the railroad company and for other relief; that the plaintiffs in that suit were corporations organized under the laws of Pennsylvania, the laws of New York, and the laws of Rhode Island, who sued on behalf of themselves and of all other companies standing in like position; that the defendants were corporations under the laws of Pennsylvania, the laws of Great Britain, and the laws of New York, certain citizens of Rhode Island, of New York, of Tennessee, two aliens, and forty-four insurance companies of West Virginia, Pennsylvania, New York, Illinois, Louisiana, Wisconsin, Alabama, Connecticut, Ohio, Texas, Indiana, and Great Britain, and that defendants petitioned for the removal of the cause to the federal court on the ground of diverse citizenship, which petition was denied. It also appeared that on the trial proof was attempted that rebates had been given in violation of the interstate-commerce laws. Plaintiffs had a decree, and the supreme court of the state affirmed the judgment below, holding that the rebates did not invalidate the contracts of carriage, and it was held that regarding the cause as a whole, or considering it under any adjustment or arrangement of the parties to the matter in dispute, there was no right of removal on the part of the defendants, or either of them; and that furthermore, since the main controversy was between the marine companies and the compress company, the latter was an indispensable party, and that no ground for removal existed, because of the separability of the controversy between it and the other insurance companies.

Construction of Agreement by Carrier to Deliver Grain "consigned" to Elevators—Local Custom.—In *Chicago, M. & N. R. Co. v. National E. & D. Co.* (Ill., Oct. 29, 1894), 38 N. E. Rep. 920, it appeared that railroad companies had agreed with an elevator company to deliver or cause to be delivered to its elevators, with all reasonable dispatch, all cars loaded with grain, consigned to either of said elevators, which should be brought to Chicago over

their respective lines of railroad, whether the said grain should be shipped from stations on their own lines or be received for transportation to Chicago at junction points from connecting lines; and it appeared that it was customary for shippers to consign grain to Chicago without specification of any elevator as the delivering point, and that railroad companies would take the designation from the consignee, or from the purchaser from the consignee, after arrival of the grain at Chicago, and it was held that it was the duty of the railroad companies to deliver or cause to be delivered to the elevators all grain brought over its lines to Chicago, whether consigned to either of said elevators at the point of shipment, or otherwise directed to be delivered to either of them by the owner or consignee while the grain is in the possession of said railroad company. The court said: "The controversy in this case turns largely upon the meaning to be given to the word 'consigned,' as that word is used in the contract of October 1, 1891. The parties agreed that the Chicago, Madison & Northern Railroad Company would deliver or cause to be delivered to the National Elevator and to the Chicago & St. Louis Elevator, respectively, with all reasonable dispatch, all cars loaded with grain, consigned to either of said elevators, which shall be brought to Chicago over its lines of railroad. Appellants claim that thereby the agreement was to deliver only such grain as at the point of shipment should be consigned to one or the other of these elevators. Appellees claim that thereby the agreement was to deliver, or cause to be delivered, all cars loaded with grain, and brought to Chicago over the Madison & Northern lines of railroad, whether such grain was consigned to one or the other of these elevators at the point of shipment, or so consigned at any time while in the possession of the railroad company. The definitions given by lexicographers to the word 'consign' are not inconsistent with either of these constructions. Mr. Baldwin, who has had 28 years' experience in the grain business in Chicago, in speaking of car-loads of grain on the track, after sale, says, in substance: 'If there are licensed carriers of class A, we don't usually send the grain off the line from which the car came, but otherwise we consign it to those anywhere we are a mind to in the city.' He manifestly understands and uses the word 'consign' in the enlarged sense contended for by appellees.

"It is urged by appellants that *Railroad Co. v. Stanbro*, 87 Ill. 195, is decisive of this case; that the court there placed a construction upon the word 'consigned' used in a statute, and held that, to bring the case within such statute, the grain must be consigned to the warehouse or place in question at the time of shipment. The claim so made has much force; but after all consideration we are inclined to the opinion that the decision there made is not applicable in the present litigation. The action there was based upon a section of the statute which is highly penal in its provisions (Laws 1871-72, p. 636; Rev. St. 1874, p. 815, § 3), and the decision was partly placed upon the ground that the statute was penal, and could not be extended by construction. But in the interpretation of the contract now before us a different rule obtains. The language used may be enlarged or limited by the attendant circumstances and the objects had in view, and more regard is due to the real intention of the parties than to some particular word that may have been used in the expression of that intention. And section 4 of the same act of the legislature wherein is found the section upon which the action in *Stanbro's* case was based reads as follows: 'All assignments of grain to any elevator or public warehouse shall be held to be temporary, and subject to change by the consignee or consignor at any time previous to the actual unloading of such property from the cars in which it is transported. Notice of any change in consignment may be served by the consignee or any agent of the railroad corporation having the property in possession who may be in charge of the

business of such corporation at the point where such property is to be delivered; and if, after such notice, and while the same remains uncanceled, such property is delivered in any way different from such altered or changed consignment, such railroad corporation shall, at the election of the consignee or person entitled to control such property, be deemed to have illegally appropriated such property to its own use, and shall be liable to pay the owner or consignee of such property double the value of the property so appropriated, and no extra charge shall be permitted by the corporation having the custody of such property, in consequence of such change of consignment.' And so if, in section 3 of the act, the word 'consigned' is used in the sense of indicating a consignment made at the time and point of shipment, and such a consignment only, yet in section 4 the word 'consignment,' a cognate word with 'consigned,' seems to have an enlarged sense attached to it—that of denoting a direction or consignment to a particular elevator or public warehouse at any time prior to the actual unloading of the grain from the cars in which it was transported. The construction of this contract of 1891 is a question of intention; and it seems to us that the conclusions to draw from the phraseology used in the act of 1871, and the decision of this court upon one of its sections, are wholly unconvincing of the matter in issue.

"As we understand the evidence in this record, it clearly shows that at the time the contract was made, and for 10 or 15 years prior thereto, all shipments by rail of grain in bulk to Chicago for sale were, as matter of fact, made from the point of shipment to some named person, firm, or corporation as consignee, and billed to Chicago simply, and not to any particular or designated elevator. The circumstance that occasionally, but very seldom, grain was purchased before shipment, and for some particular purpose, and consigned at the place of shipment to some designated elevator, does not weaken the probative force of the fact above stated; nor does the other fact, that sometimes grain, even in large quantities, which had been already sold at western points outside of Chicago for shipment to places east of Chicago, was consigned to some eastern railroad, or some elevator connected therewith. There can be no pretext that, from the standpoint of Chicago, the Chicago & Alton Railroad is an eastern road. In our opinion, the real intent and meaning of the contract of October 1, 1891, when read in the light of the existing and surrounding circumstances, was to give to the National Elevator and to the Chicago & St. Louis Elevator facilities for doing business on the lines of the Chicago, Madison & Northern Railroad Company, equally as great as those afforded by law to the competing elevators situated on the line of said railroad in Chicago."

Liability of One of Several Connecting Carriers—Misdirection by Shipper.—In *Treleven v. Northern Pac. R. Co.* (Wis., March 5, 1895), 62 N. W. Rep. 536, it was held that where goods delivered for carriage are transported over the line of the receiving carrier and delivered to the next carrier in the line of their transit, and in due season reached their destination at a point to which they have been directed by mistake of the shipper, the liability of the carrier for their safety is terminated.

Liability of Carrier for Loss of Goods in its Charge by Misdirection of Shipper, and while Acting as Agent of Shipper to Forward Goods to Destination.—In *Treleven v. Northern Pac. R. Co.* (Wis., March 5, 1895), 62 N. W. Rep. 536, it appeared that a shipper having made a mistake in directing goods to Philadelphia, N. Y., instead of Philadelphia, Pa., the agent of the carrier, at the instance of the shipper, caused proper directions to be given to forward the goods to the latter place, but before such directions were carried into effect the goods were destroyed by fire in the company's warehouse; and it was held that the assumption of the agency by the agent of the carrier would not render it liable as a common carrier,

since there was no consideration for the undertaking, which was purely voluntary, and at most amounted to a gratuitous agency on its part, and that in such a case it would only be liable in case of loss or injury caused by its negligence.

Liability of Guarantor of Freight Charges—Failure of Carrier to Observe Custom of Collecting Bills Weekly.—In *Philadelphia & R. R. Co. v. Snowden* (Pa., Jan. 21, 1895), 30 Atl. Rep. 1129, it was held that one who guarantees the payment of freights or tolls to a railroad company by a third party, then due, or thereafter to become due, cannot escape liability by showing a custom of the company to collect its tolls and freight-bills weekly, and its failure to follow such custom in the case in question.

Liability of Carrier to Holder of Bill of Lading Issued by Fraudulent Procuration to Fictitious Persons.—In *Bank of Tupelo v. Kansas City, M. & B. R. Co.* (Miss., Dec. 12, 1892), 16 So. Rep. 572, which was an action on a bill of lading, issued in Alabama, the court held that as the supreme court of that state had held that a similar bill of lading which was one of the same fraudulent series, issued in the name of a fictitious or non-existent firm, created no liability on the part of the company, it would follow that decision and would make a like determination. See *Jasper Trust Co. v. Kansas City, M. & B. R. Co. ante*, p. 153.

Liability of Express Company for Delay in Delivery of Draft—Representation as to Value.—In *Bank of Water Valley v. Southern Exp. Co.*, 71 Miss. 741, which was an action to recover for the amount of a draft which was delivered to an express company for carriage to plaintiff, and payment of which as alleged was refused because of delay in delivery, the opinion of the court was as follows: "WOODS, J.—The action is not for the recovery for the value of articles lost. There was no loss. There was only a day's delay in the delivery at the terminus of the carriage. But we are not prepared to say that this was negligence. There was nothing in the package's appearance or its endorsements that indicated any necessity for promptness in transmission or delivery. There was much to the contrary. The sender of the package represented the draft to be 'papers,' and of the value of \$50. The express company's servants might well have relied on these representations, and used such dispatch in delivery as was apparently needful, regard being had to the nature of the package, as it appeared to such servants. Independently of this, however, there was no hurtful delay on the company's part, for the draft was in the hands of the New Orleans correspondent of the appellant bank in good time for the presentation to the Whitney National Bank before the suspension of the Greenville Bank was known in New Orleans, and before there was an actual suspension. The fatal delay was in New Orleans, and not in Water Valley, as the complainant supposes."

Who May Maintain Action for Breach of Contract—Person Delivering Goods for Carriage.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 965, it was held that an allegation in a petition in an action for breach of a contract of carriage is sufficient to enable the plaintiff to maintain the action, if it shows that he caused the goods to be delivered for carriage.

Consignee.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 965, it was held that a consignee of goods is entitled to receive them, and to claim them as against the carrier.

Action for Breach of Contract of Carriage—Sufficiency of Petition—"Forwarded" Construed.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 965, which was an action for breach of a contract of carriage, the petition alleged that the goods were delivered to be carried by defendant over its road to East St. Louis, and thence to be forwarded by defendant to plaintiff at the city of St. Louis; and that defend-

ant received such goods for carriage and delivery but failed to deliver the same and it was held that the words "to be forwarded" should be interpreted so as to impose upon defendant the obligation to deliver the goods at St. Louis. The court said: "But it is insisted that a contract or duty as forwarder only is alleged as to that part of the journey between East St. Louis and St. Louis. That depends on the meaning to be given to the words 'to be forwarded by defendant to plaintiffs, at the city of St. Louis,' as they appear in this petition. If that language is susceptible of any latitude of construction, plaintiffs must receive the benefit of the most liberal interpretation that is reasonable and fair, under the statutory rule for the construction of pleadings, above quoted. In *Railway v. Piper* (1874), 13 Kan. 505, Judge BREWER, speaking for the court, in construing the words 'to be forwarded,' said: 'The company contracted to forward from Kansas City to Chicago and the word "forward" as here used seems to mean the same as "transport" or "carry." Insurance Co. v. Chase, 1 E. D. Smith 121. Having contracted to carry the Cattle to Chicago, a contract it was competent to make, even though the carriage involved transportation beyond its own line, it became responsible as a common carrier, except so far as it limited that responsibility by special contract.' In the opinion of JOHNSON, J., in the court of appeals of New York, in *Blossom v. Griffin* (1856), 13 N. Y. 575, discussing the same phrase, we find these observations: 'The terms "to be forwarded," instead of importing an absolute and unqualified undertaking on the part of the defendants to deliver the goods to some carriers who should undertake to transport them, amount to an acknowledgement of the purpose for which the goods had been delivered by the owners; that is, to be forwarded or carried by the defendants themselves, under the existing arrangement.' In *Anderson's Law Dictionary* ('Forwarded') it is stated that 'an agreement "to forward" goods may still amount to a contract for carrying.' The word 'forward' as applied to goods, has been judicially held to be equivalent to 'carry' or 'transport' in other cases besides those above quoted. *Read v. Spalding* (1859), 5 Bosw. 395, *affirmed* (1864), 30 N. Y. 630; *Express Co. v. Newby* (1867), 36 Ga. 635; *Christenson v. Express Co.* (1870), 15 Minn. 283 (Gil. 208). It was entirely competent for defendant (through the line of its road, over which it was engaged in business as carrier, extended only to East St. Louis) to contract to carry to that point on its own line, and then to assume to deliver the goods at St. Louis, or 'forward them to plaintiffs' there, over the line of some other road. 'Forwarded by defendant' (which is the language of the petition) may reasonably mean this, in connection with the context, especially when it is immediately afterwards charged that 'defendant received said bags for said carriage and delivery, but has failed to deliver the same to plaintiffs,' etc. 'While a railroad company cannot be compelled to transport to a point beyond its own line, it is well settled that it may lawfully contract to carry persons and property over its own and other lines to a destination beyond its own route; and when such a contract is made, it assumes all the obligations of a carrier over the connecting lines as well as its own.' *Railroad Co. v. Roach* (1886), 35 Kan. 740, 27 Am. & Eng. R. Cas. 257. To the same effect are *Railroad v. Campbell* (1881), 36 Ohio St. 647, 3 Am. & Eng. R. v. Twiss Cas. 246; *Railroad Co. v. Pratt* (1874), 22 Wall. 123; *Railroad Co.* (1892), 35 Neb. 267, 55 Am. & Eng. R. Cas. 434. If defendant received the goods in question here for 'carriage and delivery to plaintiffs at St. Louis,' it was bound to such delivery, and the words 'to be forwarded' should be given the interpretation which will consist with that duty as charged upon defendant."

What Constitutes Unreasonable Delay in Carriage.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 965, which was

an action for breach of a contract for the carriage of goods, it appeared that the process was served January 20th, and the petition which was filed the day previous alleged that the goods were delivered for carriage the previous May, and it was held that the non-delivery before the beginning of the action sufficiently indicated an unreasonable delay in carriage on the part of the defendant, or at least furnished a substantial foundation for the inference or a finding by the trial judge that such delay was unreasonable. *Citing Dawson v. R. Co.*, 77 Mo. 296.

Allegation of Failure to Deliver Goods in Good Order as Averment of Non-delivery or Delivery in Bad Order.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 965, it was held that an allegation in a petition for breach of a contract of carriage of goods that there was a failure "to deliver the same to plaintiff in good order," may mean either that they were not delivered at all, or were delivered in bad order.

Sufficiency of Evidence Prima Facie to Establish Negligent Delay in Transportation.—In *Davis v. Jacksonville Southeastern Line* (Mo., Dec. 22, 1894), 28 S. W. Rep. 968, it was held that where it appears that a carrier, received goods which plaintiffs caused to be delivered to it for carriage, and that the goods, after a reasonable time for the transit, have not been delivered at their destination, a *prima facie* case of negligence on the part of the receiving carrier is made out, requiring the latter to present evidence, showing absence of fault on his part, either under his contract or under the rules of law. *Citing* *Murphy v. Staton* (1811), 3 Munf. 239; *Express Co. v. Stettaners* (1871), 61 Ill. 184; *Davis v. Railway Co.* (1886), 89 Mo. 340, 26 Am. & Eng. R. Cas. 315. The court said: "'The liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier this duty is performed by a delivery to the succeeding carrier for further transportation, and an acceptance by him.' *Pratt v. Railway Co.* (1877), 95 U. S. 43. 'In all cases, however, there must be a delivery by the carrier, or something tantamount to a delivery, before he rids himself of his responsibility as such.' *Rawson v. Holland* (1875), 59 N. Y. 611. The petition in this case certainly shows that defendant, as carrier, obtained possession of the goods consigned to plaintiffs. It was not essential to aver a consideration for the assumption of obligation by the carrier. *Hall v. Cheney* (1857), 36 N. H. 26."

Measure of Damages in Action for Loss Sustained by Delay in Transportation.—In *Houseman v. Merchants' Dis. Transp. Co.* (Mich., March 5, 1895), 62 N. W. Rep. 290, which was an action against a carrier for damages alleged to have been sustained by delay in the transportation of merchandise, it was held that the measure of damages would be the difference between the market value of the goods at the time and place when by the contract they were to be delivered, and their market value the time they were actually delivered.

Duty of Carrier on Arrival of Goods at Destination.—In *Lake Erie & W. R. Co. v. Hatch* (Ohio, Mar. 12, 1895), 39 N. E. Rep. 1042, it was held that in the absence of any contract or statute to the contrary, the liability of a railroad company as a common carrier continues until notice to the consignee of the arrival of his goods, and a reasonable time, during business hours, after receipt of notice, to inspect and remove them, unless he is unknown, absent, or cannot be found, in which case the goods may be stored. The court said: "When railroads came into general use, and absorbed the bulk of the carrying trade in this country, the courts in some of the states followed the rule in maritime transportation, and held that the liability of the carrier ended upon the arrival of the goods and unloading them upon a platform or placing them in a warehouse. The courts of other states, for reasons widely differing, followed the rule applied to transportation by river, and held that the liability of the carrier by rail

continued after the arrival of the goods, until notice to the consignee and reasonable opportunity thereafter for the removal of the same. In some of the states, as New York, Tennessee, California, and perhaps others; this rule has been adopted by statute. A list of the states not requiring notice is found in 2 Am. & Eng. Enc. Law, 892, with citation of cases, and a list of the states requiring notice is found on page 893, with like citations."

Action Against Carrier to Enforce Agreement to Deliver Grain to Elevators—Necessary Parties.—In *Chicago, M. & N. R. Co. v. National E. & D. Co.* (Ill. Oct., 29, 1894), 38 N. E. Rep. 915, which was an action by an elevator company to enforce the performance of an agreement by railroad companies to deliver grain to its elevators, it appeared that the facilities for delivering the grain to the elevators were by means of the transit of the cars of the contracting companies over the tracks of another road, and it was held that such other company was not a necessary party to the action, where it did not appear that it had refused or was unwilling to furnish the facilities.

JONES

v.

NEWPORT NEWS AND MISSISSIPPI VALLEY CO.

(*United States Circuit Court of Appeals, 6th Circuit, February 5, 1895.* 65 *Fed. Rep.* 736.)

Right of Railroad Company to Remove Switch Connecting Private Warehouse with Main Line.—Although a railroad company permits a switch connection to be made between its line and a private warehouse for the purpose of the delivery of merchandise to such warehouse, and delivers merchandise thereover for years, yet it may, in the absence of any statute, discontinue or remove the connection at any time.

Same—Absence of Agreement to Allow Switch Connection for Definite Time.—On the theory of a contract between the company and the owner of the warehouse, and in the absence of any agreement to keep the switch in the main line for any definite time, there is no obligation on the company or its successors to maintain it forever.

Action for Injury Sustained by Discontinuance of Switch Connection—Sufficiency of Petition—Negating Dangerous Character of Switch.—Where by a petition in an action for injury alleged to have been caused by discontinuance of a switch connection, it appears that there was probable or possible danger to the public using the road, for that reason a discontinuance of the connection by the company was justifiable, and the failure of the petition to negative the dangerous character of the switch would render it defective.

ERROR to the circuit court of the United States for the district of Kentucky.

H. M. Jones, the plaintiff in error and the plaintiff below, filed two petitions in ordinary in the Caldwell circuit court of Kentucky against the Newport News & Mississippi Valley

Company, a corporation organized under the laws of Connecticut, and a citizen of that state, engaged in operating under a lease the railroad of the Chesapeake & Ohio Southwestern Railroad Company. The plaintiff is Case stated. the owner of land in the town of Princeton, lying near the junction of two streams, and within a few feet of the defendant's railroad bridge over one of them. The lot adjoins the right of way of defendant's railroad. The railroad at this point runs on a high embankment or fill. Some years before the filing of the petition, the plaintiff had built himself a coal-tipple and storage-bins for coal on his lot, and near the defendant's right of way, and a trestle, 15 feet high, above the ground, connecting the coal-tipple with the defendant's road-bed on the high embankment. A railroad track was laid over the trestle, so that the cars could be run from the main track by a switch to the tipple.

Plaintiff's first petition averred that, by the negligence of the agents of the railroad company, the switch from the main track of the railroad to the coal-tipple was left open, and a regular freight train, running at a high rate of speed, left the main track, and running out upon the trestle, was precipitated over the tipple, doing much damage to the plaintiff's plant, for which he asked damages.

The second petition which, by the order of the court, was consolidated with the first, described the circumstances under which the trestle and connection track were built as follows:

"That several years ago the plaintiff, desiring to go into the coal business at Princeton, Kentucky, and desiring to build for that purpose a coal-tipple on said lot, and connect the same with the main line of said railroad, owned and then operated by the Chesapeake & Ohio Southwestern Railroad Company, by trestle and a railroad track, or switch, as it is sometimes called, had plans and specifications drawn for such coal-tipple and trestle; and thereupon the said Chesapeake & Ohio Southwestern Railroad Company made and entered into a contract with him, this plaintiff, that, if this plaintiff would build the proposed coal-tipple and trestle, it would make the necessary embankment, connect the trestle with its main line of road, and lay down the track over said embankment, trestle, and coal-tipple, and connect the same with the main line of road by a switch, and thereafter deliver coal to him at said tipple, over said switch and road, on said trestle and coal-tipple, and this contract was made in the early part of 1884.

"That, in compliance with this contract, this said plaintiff, in the summer of 1884, built said coal-tipple and trestle in accordance with said plans and specifications, and the said Chesapeake & Ohio Southwestern Railroad Company built

said embankment and laid said track thereon, and on said trestle and coal-tipple, and connected the same with the main line of said railroad with a switch, and then it became a part of said main line of road, and so remained until the doing of the wrongs hereinafter complained of; and said last-named railroad company and the defendant delivered coal in car-load lots over said switch to said coal-tipple, as was their duty, from that time until the time of the doing of the wrongs hereinafter complained of, as the business of the plaintiff required said coal to be delivered.

"That said coal-tipple and trestle were built of heavy timber, and were about fifteen feet high, and were very expensive, and cost this plaintiff not less than \$——; and, in addition thereto, he built a room under one of the bents of said coal-tipple, and fitted it up for an office, bought and put up a pair of wagon scales, built a bridge across the Dallam Spring, which was necessary to get the wagons to the scales, put a roof over the coal-tipple, bought a wagon and a pair of mules, and in every way fitted himself up to run a coal business, and did run a coal business, at that place and on said coal-tipple, for a number of years, and until the doing of the wrongful acts hereinafter complained of. Said trestle and coal-tipple is the same mentioned in the first paragraph of this petition.

"That afterwards the Chesapeake & Ohio Southwestern Railroad Company leased said railroad from Louisville to Paducah, Ky., through Princeton, Ky., to the defendant, which took possession under said lease, and for several years last past has operated and controlled said road under said lease, and assumed the duties and contracts of said lessor company, including its duty to and contract with this plaintiff, and for several years fulfilled and performed said duty and contract, and then, ratifying the old contract, made a new one with this plaintiff, by which he was to repair and rebuild a part of said trestle, which he did at great expense, not less than \$——, to himself, and it was its duty at all times to keep said switch to said coal-tipple in good order, and to deliver coal to him over said switch to said coal-tipple; but, notwithstanding said contract and said duty, the defendant has violated its contract and its duty, and soon after the accident referred to in the first paragraph of this petition, and in the month of —, 1892, the defendant wrongfully and without right tore up and removed said switch and all the iron forming the railroad from the main line of road to said coal-tipple over said trestle, and has since wrongfully and without right refused to relay said track, or to deliver coal to this plaintiff at said coal-tipple, thus rendering worthless to this plaintiff, and utterly destroying, the value of said coal-tipple and

trestle, and utterly breaking up and ruining the plaintiff's said coal business, to the damage of this plaintiff five thousand dollars, which damage said defendant refuses to pay, although demanded.

"Wherefore the plaintiff prays for damages against the defendant for five thousand dollars, and for interest thereon from date of judgment until paid, and for his costs and all proper relief."

The two petitions were carried by removal from the state circuit court into the court below, where they were consolidated, as already stated, and thereafter the defendant demurred to both stated, and thereafter

The demurrer to the first cause of action was overruled.

The demurrer to the second cause of action was sustained, and upon that judgment was entered for the defendant.

The first cause of action was submitted to the jury and resulted in a verdict and judgment for the plaintiff.

The plaintiff sued out a writ of error to the ruling of the court in sustaining the demurrer to the second cause of action and in rendering judgment for the defendant thereon.

The correctness of the ruling of the circuit court in sustaining the demurrer to the second cause of action is therefore the sole question for consideration in this court.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge (after stating the facts). Plaintiff bases his claim for damages—First, on the violation of an alleged common-law duty; and, second, on a breach of a contract.

1. The proposition put forward on plaintiff's behalf is that when a railroad company permits a switch connection to be made between its line and the private warehouse of any person, and delivers merchandise over it for years, it becomes a part of the main line of the railroad, and cannot be discontinued or removed, and this on common-law principles and without the aid of a statute. It may be safely assumed that the common law imposes no greater obligation upon a common carrier with respect to a private individual than with respect to the public. If a railroad company may exercise its discretion to discontinue a public station for passengers or a public warehouse for freight without incurring any liability or rendering itself subject to judicial control, it would seem necessarily to follow that it may exercise its discretion to establish or discontinue a private warehouse for one customer.

Right of company to remove switch connection.

In *Northern Pac. Ry. Co. v. Washington Territory*, 142 U. S. 492, 12 Sup. Ct. 283, it was held that a mandamus would

not lie to compel a railroad company to establish a station and stop its trains at a town at which for a time it did stop its trains and deliver its freight.

In *Com. v. Fitchburg R. Co.*, 12 Gray, 180, it was attempted to compel a railroad company to run regular passenger trains over certain branch lines upon which they had been run for a long time, but had been discontinued because they were unremunerative. The court held that mandamus would not lie because the maintenance of such facilities was left to the discretion of the directors. Referring to this and other cases, Mr. Justice GRAY, delivering the opinion of the supreme court in *Northern Pac. Ry. Co. v. Washington Territory*, *supra*, said: "The difficulties in the way of issuing a mandamus to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself are much increased when it is sought to compel the corporation to establish or to maintain a station, or to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public, as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of the population and business at, near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or in case of abuse of their discretion by the legislature, or by administrative boards intrusted by the legislature with that duty, than by ordinary judicial tribunals. * * * To hold that the directors of this corporation, in determining the number, place, and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases."

Among the cases which Mr. Justice GRAY cites in support of the foregoing is that of *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58. In that case it was sought to compel a railroad company by mandamus to enlarge a passenger and freight station which was admittedly inadequate, but the writ was denied. The ground for the conclusion of the court, as stated by Mr. Justice GRAY, was that "the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station-houses for passengers waiting transportation," and no such duty was imposed by statute.

See, also, *Florida, C. & P. R. Co. v. State*, 31 Fla. 482.

It is true that the foregoing were cases of mandamus, and

that the court exercises a discretion in the issuance of that writ which cannot enter into its judgment in an action for damages for a breach of duty. But the cases show that the reason why the writ cannot go is because there is no legal right of the public at common law to have a station established at any particular place along the line, or to object to a discontinuance of a station after its establishment. They make it clear that the directors have a discretion in the interest of the public and the company to decide where stations shall be, and where they shall remain, and that this discretion cannot be controlled in the absence of statutory provision. Such uncontrollable discretion is utterly inconsistent with the existence of a legal duty to maintain a station at a particular place, a breach of which can give an action for damages. If the directors have a discretion to establish and discontinue public stations, *a fortiori* have they the right to discontinue switch connections to private warehouses. The switch connection and transportation over it may seriously interfere with the convenience and safety of the public in its use of the road. It may much embarrass the general business of the company. It is peculiarly within the discretion of the directors to determine whether it does so or not. At one time in the life of the company, it may be useful and consistent with all the legitimate purposes of the company. A change of conditions, an increase in business, a necessity for travel at higher speed, may make such a connection either inconvenient or dangerous, or both. We must therefore dissent altogether from the proposition that the establishment and maintenance of a switch connection of the main line to a private warehouse for any length of time can create a duty of the railroad company at common law forever to maintain it. There is little or no authority to sustain it.

The latest of the Illinois cases which are relied upon is based upon a constitutional provision which requires all railroad companies to permit connections to be made with their track, so that the consignee of grain and any public warehouse, coal-bank, or coal-yard may be reached by the cars of said railroad. The supreme court of that state has held that the railroad company has a discretion to say in what particular manner the connection shall be made with its main track, but that this discretion is exhausted after the completion of the switch and its use without objection for a number of years. *Railroad Co. v. Suffern*, 129 Ill. 274. But this is very far from holding that there is any common-law liability to maintain a side-track forever after it has once been established. The other Illinois cases (*Vincent v. Railroad Co.*, 49 Ill. 33; *Chicago & N. W. Ry. Co. v. People*, 56 Ill. 365) may be distin-

guished in the same way. They depended on statutory obligations, and were not based upon the common law, though there are some remarks in the nature of *obiter dicta* which gives color to plaintiff's contention. But it will be seen by reference to Mr. Justice GRAY's opinion, already quoted from, that the Illinois cases have exercised greater power than most courts in controlling the discretion of railroads in the conduct of their business.

In *Barre R. Co. v. Montpelier & W. R. Co.*, 61 Vt. 1, the question was one of condemnation. The law forbade one railroad company to condemn the line of another road, and the question was whether the side-tracks of the railroad company which, with the consent of the owners of the granite quarry, ran into a quarry in which a great business was done, were the line of the railroad within the meaning of the statute. It was held that they were so far as to impose obligations on and create exemptions in favor of the railroad company operating the side-tracks. We may concede, for the purpose of this case, without deciding, that, as long as a railroad company permits a side-track to be connected with its main line for the purpose of delivering merchandise in car-load lots to the owner of the side-track, the obligation of the railroad company is the same as if it were delivering these cars at its own warehouse, on its own side-track. But this we do not conceive to be inconsistent with the right of the directors of the railroad company, exercising their discretion in the conduct of the business of the company for the benefit of the public and the shareholders, to remove a side-track connection.

The recital of the facts in the petition in this case is enough to show that the switch connection of the plaintiff was one of probable or possible danger to the public using the railroad, and to justify its termination for that reason. It was made on a high fill, on the approach to a bridge across a stream, and the switch-track ran on to a trestle 15 feet above the ground, and terminating in the air. Even if the discretion reposed in the directors to determine where switch connections shall be made or removed were one for the abuse of which an action for damages would lie, the petition would be defective, because it does not attempt in any way to negative the dangerous character of the switch which the facts stated certainly suggest as a good ground for the action of the company complained of.

2. The petition makes no better case for the plaintiff on the theory of a contract than on a common-law liability. It is not alleged that either the defendant or its predecessor agreed to keep the switch in the main line for any definite time,

or that either expressly agreed to keep it there forever. The plaintiff contends that, nothing having been said as to the time, the implication is that the switch was to be maintained at all times, i.e. forever. Such a construction is quite at variance with the views of the supreme court, as expressed in *Texas & P. Ry. Co. v. City of Marshall*, 136 U. S. 393. In that case the city of Marshall filed a bill in equity to enforce an agreement with the railroad company under which it had given the railroad company \$300,000 in county bonds and 66 acres of land in the city limits, and the company, in consideration of the donation agreed "to permanently establish its eastern terminus and Texas office at the city of Marshall, and to establish and construct at said city the main machine-shops and car-works of said railroad company." It was held that the contract on the part of the railroad company was satisfied and performed when the company had established and kept a depot and offices at Marshall, and set in operation said car-works and machine-shops there, and kept them going for eight years, and until the interests of the railway company and the public demanded a removal of all or part of these subjects of the contract to some other place; that the word "permanent," in the contract, was to be construed with reference to the subject-matter of the contract, and, under the circumstances of the case, it was complied with by the establishment of the shops, with no intention at the time of removing or abandoning them; that if the contract were to be interpreted as one to maintain forever the eastern terminus and the shops and Texas office at Marshall, without regard to the convenience of the public, it would become a contract that could not be enforced in equity. In this case, Mr. Justice MILLER, speaking for the court, and referring to the contract, said: "But it did not amount to a covenant that the company would never cease to make its eastern terminus at Marshall; that it would forever keep up the depot at that place; that it would for all time continue to have its machine-shops and car-shops there; and that, whatever might be the changes of time and circumstances of railroad rivalry and assistance, these things alone should remain forever unchangeable. Such a contract, while we do not say that it would be void on the ground of public policy, is undoubtedly so far objectionable as obstructing improvements and changes which might be for the public interest, and is so far a hindrance in the way of what might be necessary for the advantage of the railroad itself, and of the community which enjoyed its benefits, that we must look the whole contract over critically before we decide that it bears such an imperative and such a remarkable meaning."

Absence of
agreement to
allow switch
for definite
time.

In the light of this construction of an express agreement to locate and maintain a depot permanently at a town on the line of a railroad, it would seem clear that we should not imply in a contract for a private switch connection a term that it shall be perpetual, and thus forever limit the discretion of the directors to deal with a subject which may seriously affect the convenience or safety of the public in its use of the road.

The judgment of the circuit court is affirmed, with costs.

UNION PACIFIC R. Co.

v.

RAINEY.

(*Colorado Supreme Court, December 4, 1893.*)

Rights, Duties, and Obligations of Railroad Companies Engaged in the Transportation of Live Stock.—A railroad company engaged in the transportation of live stock for hire is not the special agent of the owner, but is a common carrier, having the same rights and subject to the same duties and obligations as a common carrier of goods.

Liability of Railroad Company for Injury to Stock by Defective Car.—The selection by a railroad company of a dangerous and unsafe car for the transportation of live stock will render it liable for injuries to the stock because of the defective condition of such car.

Effect of Failure of Shipper to Notice Defect in Car.—The failure of a shipper to notice a defect not easily recognized, and consisting of apertures so large as to permit the feet of horses to go through, is not such negligence as will preclude a recovery by the shipper for injuries to the horses by reason of their getting their feet through and being unable to withdraw them.

Right of Carrier to Limit its Liability for Fraud, Negligence, etc.—A common carrier cannot divest itself of liability either by special contract or notice where damage or loss sustained results from its fraud, negligence, or misfeasance.

APPEAL from Arapahoe county.

Action for injuries to horses while in transit from Kansas City to Denver, over defendant's railroad. Judgment for plaintiffs for \$500. Defendant appeals. The
Case stated. plaintiffs in their complaint allege that defendant was a common carrier for hire and as such received from plaintiffs 19 horses which, for a valuable consideration, it

undertook to carry and safely transport to the city of Denver, in the state of Colorado; that defendant carelessly and negligently, without giving plaintiffs an opportunity to inspect the same, furnished a car for the transportation of said horses which was not suitable for the carriage of horses and was defective and unsafe; that, as a result of defendant's negligence, said horses were damaged in the sum of \$1997.

The first defense consists of a general denial.

The second defense alleges that at the time of delivery of the horses to defendant plaintiff Rainey was in possession thereof and applied to defendant, as a common carrier, to transport the same to Denver, Colo.; that then and there a special contract was entered into between Rainey, acting for himself and his coplaintiff, and the defendant company, whereby, for a certain reduced rate, the defendant company was released from all liabilities not resulting from defective trucks, wheels, or axles.

Teller & Orahood and C. M. Kendall, for appellant.

S. L. Carpenter, for appellees.

HAYT, C.J. (after the foregoing statement).—The negligence complained of as having caused the injury to the horses in question consisted in the defendant furnishing an unsuitable car, as it is claimed, for the transportation of the horses. The particular defect in the car pointed out is that the slats upon the side of the car were too far apart, leaving the apertures so large as to permit the horses' feet to be protruded through the slats; that as a result of this defect the horses' feet were protruded between the slats and, being unable to withdraw them, they were, as a result, thrown down and trampled upon by the others. The testimony tends to show that, in the manner indicated, four horses received fatal injuries, while others were badly disabled. The evidence further shows that the car was so unsuitable to the transportation of horses that it was side-tracked by the defendant company at the station of Ellis, on the route between Kansas City and Denver, the horses removed from the car, and the car repaired, occasioning a delay of 24 hours, during which time the horses were exposed to a beating rain-storm, causing additional damage.

The case was tried to the court without the intervention of a jury, and, while there is some conflict in the evidence, we must upon this review assume, in support of the judgment of the district court, that the facts alleged by the complaint were sufficiently established by the evidence.

As to whether a railroad company transporting animals is

to be treated as a common carrier, and not as the special agent of the owner, is a question about which much has been written, and some diversity of opinion exists. In earlier times, when the common law with reference to common carriers had its birth in England, there was in existence no suitable method of transporting live stock, and upon this is largely founded the doctrine of the English courts that railroad companies are not to be considered as common carriers of live stock. This doctrine has led to the announcement of similar conclusions by some of the courts in this country. However, we think the decided weight of authority and reason is in support of the opposite conclusion.

In our judgment, no good reason can be found in support of the conclusion that railroad companies are common carriers of the innumerable articles received and transported daily, which does not apply to the transportation of live stock. In this country the live-stock business is one of the most important with which we have to deal. The boundless prairies of the west are the home of vast herds of horses, cattle, and other animals. For the support of this industry, a market for the stock must be found. This market is usually found in distant parts, where the country is more densely populated, and from the business thus furnished railroad companies derive a large part of their revenue. The rights and franchises which have been so freely extended to the railroad companies were upon the condition that they should be common carriers of passengers and merchandise, and we see no reason why an exception should be made against live stock.

Mr. Hutchinson, in his excellent work on Carriers, as a result of a review of the authorities upon the subject, has made certain deductions, which are so tersely and cogently stated by the eminent author that we shall quote and adopt them, without undertaking, in this opinion, to analyze the authorities upon which they are based: "The carrier of living animals as freight is therefore to be regarded as a common carrier as to such freight, and not as a special agent of the owner for their transportation, as has been sometimes contended. But, as the law has introduced by implication into every contract for the carriage of goods an exception to the carrier's liability in cases where the loss of them, while in his charge, has been occasioned by the act of God, or of the public enemy, or by their own decay from an inherent infirmity, or by the fault of the owner himself, so it has, from the necessity and justice of the case, introduced an exception in favor of the carrier of live stock, of accountability for its loss or injury resulting from its own uncontrollable vicious propensities, and the damages in-

cident to its carriage from its inherent natural character." Hutch. Carr. (2d Ed.) § 222.

In support of the author's conclusion that a railroad company engaged in the transportation of live stock is a common carrier of such stock, the following cases, among the many which may be found, are cited: *Welsh v. Railroad Co.*, 10 Ohio St. 65; *Moulton v. Railway Co.*, 31 Minn. 85, 12 Am. & Eng. R. Cas. 13; *Ormsby v. Railroad Co.*, 2 McCrary, 49, 4 Fed. Rep. 706; *Railway Co. v. Reynolds*, 8 Kan. 623; *Railroad Co. v. Pratt*, 22 Wall. 123; *Lawson*, Cont. § 137; *McFadden v. Railway Co.*, 92 Mo. 343, 30 Am. & Eng. R. Cas. 17.

A common carrier is bound to furnish suitable vehicles for the transportation of such freight as he undertakes to carry, and if he fails to do this, and injury results from such failure, he is liable. It has been said, however, that when the shipper assists in loading live stock of his own without objection to the car at the time, he cannot afterwards recover for an injury resulting from a defect in the car apparent to him. *Ror. R. R.* p. 1307.

Duty of carrier to furnish safe vehicle—
Failure of shipper to notice defect.

In support of the text the author cites *Betts v. Trust Co.*, 21 Wis. 81; *Railway Co. v. Van Dresar*, 22 Wis. 511; *Railroad Co. v. Dunbar*, 20 Ill. 623; *Railroad Co. v. Whittle*, 27 Ga. 535. The conclusions reached in all the above cases are based, to a large extent, upon the holding of the courts in the particular states that railroad companies are not common carriers of live stock, or that the obligation of the common carrier did not rest upon the company in the particular case before the court.

Aside from this, in *Betts v. Trust Co.*, *supra*, the negligence complained of consisted in the unsafe condition of the door of the car containing the animals. The owner himself, having loaded the car, knew of the condition of the door, and did not inform the company, which was ignorant of the fact. Under these circumstances, it was held that the owner could not recover for injuries received by the cattle in escaping from the car in consequence of such defect; that it was attributable to his own negligence.

In *Railway Co. v. Van Dresar*, *supra*, the plaintiff loaded the cattle injured in a tight box-car, instead of the ordinary cattle-car, and the court held that he could not recover for losses resulting from his own negligence. The decision also rests to some extent upon a special contract. In the Illinois case the cars were hired from the railroad company, to be laden as the hirer chose, and the court held that the company did not incur any risk as to the mode adopted by him in loading the cars.

In the Georgia case it was held that, if the railroad company hires cars to a shipper absolutely, he cannot look to the company, as a common carrier, for damages, in case of injury to his property. The case is hardly in point in support of the text of the author, the facts being that the plaintiff loaded two cars with hogs. The agent of the railroad company promised that he would put slats across the doors. This the agent did not do, and the court held that, if the damage to the hogs was attributable to such omission, the railroad company was liable for a breach of this contract. It was urged in defense that as plaintiff was present, and acquiesced in the manner in which the hogs were secured, he was guilty of contributory negligence, and could not recover. As a reason for rejecting this defense, the court stated that it was apparent that the owner acquiesced temporarily in the manner in which the doors were closed, relying upon the agent to fulfill his promise to have them properly slatted. At most, it is but a negative authority in support of the text.

In all the foregoing cases, it expressly appears that the plaintiff had knowledge of the particular defect which was the proximate cause of the injury, while the proof in this case expressly negatives the knowledge on the part of these plaintiffs of the defect to which the injury in this case is attributable. Plaintiff Rainey was the only witness examined upon this point, his coplaintiff not being present at the time of the shipment. He says: "When I saw the car, I objected to it. * * * My objection to the car was that it was too low, and was a bad car generally. * * * I didn't notice the slats. I never had a horse get his foot in there before, and I did not notice that." Plaintiffs are not brought within the rule given by Mr. Rorer. If, with knowledge of the particular defect relied upon to charge the defendant, they had accepted the car, a different case would have been presented. Even under such circumstances, there is excellent authority in support of the liability. *Railroad Co. v. Pratt, supra*. The defect was one not easily recognized.

The selection of the car was entirely with the railroad company, and plaintiffs had a right to assume that it was suitable for the purposes for which it was furnished, and the company cannot be allowed to escape responsibility for its own negligence upon the plea that plaintiffs should have noticed the defect, and rejected the car.

It is contended that, under the written contract, defendant is expressly relieved from liability. Whether a common carrier can, by contract, provide against liability for his negligence, is a question that has occasioned much discussion. Whatever may be the result of judicial decision elsewhere, in

this state the rule denying the right is firmly established. In *Transportation Co. v. Cornforth*, 3 Colo. 280, THATCHER, C.J., says: "The doctrine that a com-
mon carrier cannot divest himself of liability either Limitation of Liability. by special contract or notice, where damage or loss results from his fraud, negligence, or misfeasance, may now be considered as well established in this country." See also *Carr v. Schafer*, 15 Colo. 48; *Railroad Co. v. Pratt*, *supra*; *Moulton v. Railway Co.*, *supra*.

The judgment of the district court will be affirmed.

Carriers of Live Stock Generally.—See notes 18 Am. & Eng. R. Cas. 534; 16 Am. & Eng. R. Cas. 152; 7 Am. & Eng. R. Cas. 389; 3 Am. & Eng. R. Cas. 489; 35 Am. & Eng. R. Cas. 615 and 692.

Duty of Carrier to Furnish Proper Facilities for Transportation—Defective Cars—Notice to Shipper.—See *Coupland v. Housatonic R. Co.* (Conn.), 380 and note 395; *Western Railway of Alabama (Ala.)*, 45 Am. & Eng. R. Cas. 358, and note, 367.

Limitation of Liability by Carriers of Live Stock.—See *Johnstone v. Richmond & Danville R. Co.* (S. Car.), 55 Am. & Eng. R. Co. 346 and note 353; *Alair v. Northern Pacific R. Co.* (Minn.), *Id.* 357; *Georgia Railroad & Banking Co. v. Reid* (Ga.), *Id.* 363; *Louisville & Nashville R. Co. v. Sowell* (Tenn.), 49 Am. & Eng. R. Cas. 166, and note, 169.

Unsafe and Defective Cars—Duty of Company to Furnish Reasonably Safe Cars—Vicious Animals.—In *Betts v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 22, 1894), 60 N. W. Rep. 623, it was held that a railroad company is bound to provide a reasonably safe car for the transportation of live stock, having in view such conduct as is usual or ordinary for the animals, even though such conduct might be the result of their natural propensities, and that the company would be liable for damages resulting from neglect to provide such a car, but if such a car was provided and the animals were injured because of their natural propensity to kick or otherwise act, there could be no recovery.

In *Selby v. Wilmington & W. R. Co.* (N. Car., Oct. 17, 1893), 18 S. E. Rep. 88, it was held that while it may be the duty of carriers which undertakes to transport live stock, to provide cars strong enough to transport animals that are ordinarily unruly, the law does not impose upon them the duty of detecting such animals as are vicious, and of acting accordingly, but the vehicle furnished must be suitable for the safe conveyance of animals of the class although it is not required that it shall be strong enough to withstand the struggles of some of that class that may be not only unruly, but vicious.

What Constitutes a Safe Car—Inability to Withstand Slight Kicks.—In *Betts v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 22, 1894), 60 N. W. Rep. 623, it was held that a car the sides of which are so constructed that a slight kick from a horse or mule will break them is not a suitable car for the transportation of such animals. The court said: "The grounds of recovery, as stated in the third count, are that the car 'was unfit for the purposes of shipping stock, by reason of its weakness and unfitness.' The following instructions are made a ground of complaint: 'It was the duty of the defendant railway company to provide a suitable car and one of sufficient strength for the purpose of shipping mules and horses; and if the defendant failed to do so, and, by reason of such failure or neglect, some of the animals shipped in said car were injured, the defendant is liable for the injury caused thereby to said animals. When a railway company undertakes to carry horses and mules, they are bound to furnish such cars

as are strong enough to hold such animals from injuring themselves by reason of the weakness of such car; and if you find the car was broken in which the stock of plaintiff was shipped from Des Moines, and that same was broken by the ordinary acts and usual conduct of such stock when carried on cars on a railway, then, as to this issue, you will find for plaintiff.' Defendant asked instructions embodying the rule that if the car was reasonably safe for the purpose of carrying stock, and that the 'stock, by reason of fear, anger, excitement, or from any other cause in the nature of the animal to kick, did kick, and break holes in the sides of the car, whereby some of the legs of the animals were skinned, and they injured themselves from their own vicious natures, * * * without fault or negligence on the part of defendant,' it would not be liable. Properly considered, we do not think there is an essential difference between the rule asked and the one given. We understand the rule to be that the company must provide a reasonably safe car for the transportation of stock, and that when a car is provided, and stock is injured because of its viciousness or disposition to kick or otherwise so act as to injure itself, or one animal injures another, where the injury is not a result of neglect on the part of the company to properly care for the stock, the company is not liable. This is the rule of *McCoy v. Railway Co.*, 44 Iowa, 424; *Kinnick v. Railway Co.*, 69 Iowa 665, 27 Am. & Eng. R. Cas. 55. It is not, however, to be understood that a reasonably safe car is one that will merely hold or confine the stock for transportation, but it must be a car reasonably safe for transporting the stock without injury from any causes that should be reasonably anticipated.

"In *Kinnick v. Railway Co.*, *supra*, the *McCoy* Case is referred to, and the rule is announced 'that, when the cause of damage for which recompense is sought is connected with the character or propensities of the animals undertaken to be carried, the ordinary responsibility of the carrier does not attach.' Appellant relies on this rule, and insists that the company was not required to furnish a car in which the animals would not be injured by kicking, because the damage is the result of the character or propensities of the animals to kick. That is giving to the rule, as announced, too broad a construction. The facts of the cases in which the rule has been announced indicate very fairly its intended scope. It is surely not to be thought that if a car is so constructed that stock, from its natural disposition to crowd, should be injured because of a manifestly faulty construction of the sides of a car, the company would not be liable. Such a rule would not be contended for; and it will be conceded, we think, that the company, in the construction of its cars for such a purpose, must have in mind that stock so confined are likely to crowd and be forced against the sides of a car, and it must so construct its cars as to avoid unnecessary injury. If this is correct, the literal application of the rule as claimed by appellant cannot obtain, and it certainly should not. Horses and mules, when thus confined, may not be as likely to kick, as to crowd, but we cannot say that it is not usual for them to both crowd and kick, at least to some extent."

Defect not Contributing to Injury—Objections to Car by Shipper.—In *Illinois Central R. Co. v. Scruggs*, 69 Miss. 418, which was an action to recover for injuries to horses alleged to have been sustained by the negligence of the carrier it appeared that the car in which the horses were injured was the same in which they had been carried by a connecting line, and it was held that the mere fact that the shipper had made some objection to the car because the slats were too far apart was not sufficient to show that the cars were unsafe, in the absence of any showing or suggestion that the supposed defect contributed at all to the injury, and where the transportation appeared to have been prudently and speedily made, and all reasonable

opportunities given for feeding and resting the animals, which opportunities were fully availed of.

Competency of Witness as to Sufficiency of Cars.—In *Betts v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 22, 1894), 60 N. W. Rep. 623, it was held that a person familiar with the shipping of stock in stock-cars, having had personal experience in that connection for about nine years, was competent to testify as to whether or not a certain car was sufficient and suitable to hold horses. The court said: "It is urged that it was error to permit the answer. We do not think so. The claim is that it was stating a conclusion, so as to bring it within the rule of *Curl v. Railway Co.*, 63 Iowa, 417, 11 Am. & Eng. R. Cas. 85; 16 Am. & Eng. R. Cas. 379. *Barnes v. Town of Newton*, 46 Iowa, 567; and *Spears v. Town of Mt. Ayr.*, 66 Iowa, 721. In two of the cited cases it was held that it was not competent for a witness to state a conclusion as to whether or not a sidewalk was dangerous, but that the facts should be stated, and leave the conclusion to the jury. In the other case an important issue was as to whether or not a conductor allowed a passenger reasonable time in which to pay his fare before ejecting him from the car; and it was held that the conductor as a witness, could not state the conclusion that he did give such time. In those cases, when the facts were stated, the jury could as well find the conclusion as the witness could form one from his knowledge of the facts; for, with the facts known, no particular experience, skill or knowledge was necessary to reach the conclusion. But the character of a car that will meet the requirements for shipping stock is to be known from experience or observation as to what will meet the test. To reach such a conclusion, one should have knowledge of the usual habits of stock when confined in cars, and what kind of cars have and have not proved sufficient for such purposes."

Province of Jury as to Negligent Construction of Stall in Car.—In *Armstrong v. United States Exp. Co.*, 159 Pa. St. 640, it was held that where the evidence is conflicting as to the alleged negligence of an express company in the construction of a stall in a car for occupation by a horse during transportation, the question is for the jury.

NEWPORT NEWS & MISSISSIPPI VALLEY CO.

v.

UNITED STATES.

(*United States Circuit Court of Appeals, 6th Circuit, April 3, 1894, 61 Fed. Rep. 488.*)

Construction of Statute Requiring Carriers to Unload Live Stock for Rest, Food, and Water.—Section 4386, Rev. Stat. U. S. which provides that railroad companies engaged in the transportation of live stock from one state to another shall not transport such stock for a longer period than 28 consecutive hours without unloading for rest, water, and feeding for a period of at least five hours, unless prevented by storm or other accidental causes, contemplates relief of the transporting company, only when

it is prevented from complying with the act by the unavoidable result of a storm or by other unavoidable accidental causes, but does not exonerate it where the failure to comply is because of an accident due to its own negligence.

In error to the United States court for the district of Kentucky.

Holmes Cummins, for plaintiff in error.

Geo. W. Jolly, for the United States.

Before TAFT and LURTON, Circuit Judges, and KEY, District Judge.

LURTON, Circuit Judge.—This was a suit by the United States to recover from the Newport News & Mississippi Valley Company the statutory penalty imposed by sections 4386, 4387, and 4388 of the Revised Statutes of the United States for the detention of cattle while being transported over appellant's line of railroad, for a longer period than 28 consecutive hours, without being unloaded for rest, food, and water. There was a verdict of guilty, from which the railroad company has appealed. The statute involved is as follows: "Sec. 4386. No railroad company within the United States whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another, or the owners or masters of steam, sailing, or other vessels, carrying or transporting cattle, sheep, swine, or other animals from one state to another, shall confine the same in cars, boats, or vessels of any description for a longer period than twenty-eight consecutive hours, without unloading the same for rest, water, and feeding, for a period of at least five consecutive hours, unless prevented from so unloading by storm or other accidental causes. In estimating such confinement, the time during which the animals have been confined without such rest on connecting roads from which they are received shall be included, it being the intent of this section to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon contingencies hereinbefore stated. Sec. 4387. Animals so unloaded shall be properly fed and watered, during such rest, by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad company or owners or masters of boats or vessels transporting the same, at the expense of the owner or person in custody thereof; and such company, owners, or masters shall, in such case, have a lien upon such animals for food, care, and custody furnished, and shall not be liable for any detention of such animals. Sec. 4388. Any com-

pany, owner, or custodian of such animals who knowingly and willingly fails to comply with the provisions of the two preceding sections shall, for every such failure, be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars. But when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest, the provisions in regard to their being unloaded shall not apply."

The district judge charged the jury, in substance, that if they found that the live stock had been confined on the cars of the appellant company for a longer period than 28 consecutive hours, without being unloaded for rest, food, and water, it would be no defense that such confinement had been caused by an accident to the train, due to Construction of statute. negligence. The case must turn upon the correctness of this charge. Was the appellant "prevented from unloading by storm or other accidental causes?" If so, then the penalty has not been incurred. The contention of counsel for appellant is that the excuse for overconfinement specified in the act, "storm," is one of a class within what the law regards as an "act of God," against which a common carrier does not insure, and that congress has to that class added another of a different character, described as "other accidental causes;" that the use of the disjunctive "or," after "storm," indicates a purpose to except detentions due to causes not the act of God, and described by the term "accidental;" that this construction finds support in section 4388, which imposes the penalty only upon such carriers as "knowingly and willingly" fail to comply with the requirements.

This reasoning, while plausible, is not satisfactory. To yield to it would emasculate a statute having a most humane object in view. Congress did not mean that simply because the carrier had encountered a storm, therefore he should be excused. It must appear that the storm "prevented" obedience. The storm could not be prevented. Its consequences may be avoided or mitigated by the exercise of diligence. If, with all reasonable exertion, a carrier is unable, by reason of a storm, to comply with the law, then he has been unavoidably "prevented" from obeying the law. If, notwithstanding the storm, he could by due care have complied with the law, then he is at fault, because "his own negligence is the last link in the chain of cause and effect, and in law the proximate cause" of the failure to comply with the law. Therefore, to avail himself of the excuse of "storm," the carrier must show, not only the fact of a storm, but that with

due care he was "prevented," as an unavoidable result of the storm, from complying with the law. We can reach but one conclusion as to the meaning of congress by the expression "other accidental causes."

If the storm is no excuse, unless its unavoidable effect was to prevent compliance, then it follows that no other accidental causes would be an excuse, unless that cause and its effect are likewise unavoidable. The meaning of the general words, "other accidental causes," must be ascertained by referring to the preceding special words. The rule "*noscitur a sociis*" is clearly applicable. A storm is unavoidable, in the sense that it cannot be prevented. "Other accidental causes" must be taken to mean other unavoidable accidental causes. An effect attributable to the negligence of the appellant is not an unavoidable cause. The negligence of the carrier was the cause; the unlawful confinement and unreasonable detention, but an effect of that negligence. What is an inevitable or unavoidable accident has been very thoroughly considered by this court in the case of *Weeks v. Transit Co.*, 61 Fed. Rep. 120. It was there said that an inevitable accident—"Was an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case." Again, we said: "An accident is said to be inevitable when it is not occasioned in any degree, either remotely or directly, by the want of such care and skill as the law holds every man bound to exercise."

These definitions apply to an unavoidable accident, which is, in the sense of the law, an inevitable occurrence, as defined in that case, and those cited therein. If the accident was one which might have been avoided by due care, then the carrier must be taken to have contemplated the reasonable consequences of his own negligence. In this sense, he may be said to have "knowingly and willingly" failed to comply with the requirements of the law. If he was not prevented by lawful excuse, he has knowingly and willingly failed to unload for rest, food, and water, as required by law. The several sections of the act must be construed together. We must give effect to the first section, as well as to the third. To put the construction upon the words "knowingly and willingly" contended for by appellant, would be to eliminate the positive terms of the affirmative section of the act. Congress has specified the excuse which will take a case without the act. If the statutory contingencies are not shown to have prevented compliance, the carrier has willingly failed to unload as required.

In view of this construction of the act, the other assign-

ments of error are immaterial. The case turned below exclusively upon the question as to whether the delay in unloading had been due to a negligent accident to the train. The facts were submitted to the jury under a proper charge, so far as appellant is concerned.

The judgment must be affirmed.

Duty of Carrier to Unload, Feed, and Water Stock.—See note, 55 Am. & Eng. R. Cas. 345; Illinois Central R. Co. v. Peterson (Miss.), 49 Am. & Eng. R. Cas. 171, and note, 175.

ABRAMS

v.

MILWAUKEE, LAKE SHORE & WESTERN R. CO.

(87 Wisconsin, 485.)

Limitation of Liability by Carrier—Injuries by Refusal of Carrier's Servants to Furnish Facilities for Feeding and Watering.—A common carrier contracting for the transportation of live stock cannot exempt itself from liability for injuries to such stock caused by the refusal of its servants to allow persons in charge of the stock to feed and water it as required by statute.

Same—Effect of Absence of Agreed Valuation of Stock in Contract for Transportation.—In the absence of an agreed valuation of stock in a contract for its transportation, the carrier cannot limit its liability for injuries caused by its negligence or that of its employes, to a fixed sum.

APPEAL from circuit court, Winnebago county.

On March 31, 1890, the plaintiff and one Richard Abrams were each the owners of four several horses at Harrison, Lincoln county, Wis., and shipped the same upon the cars of the defendant from that station to Oshkosh. That at the time of said shipment the agent of the plaintiff and said Richard Abrams entered into a written agreement respecting said shipment, of which the following is a copy, to wit: "Harrison Station, March 31, 1890.

Case stated.

"Received from Joe Phelan, consigned to G. W. Pratt, Oshkosh, live stock described as follows, viz.: Horses in M., L. S. & W. car number 3204, to be delivered at Oshkosh at the following rates, viz. tariff. In consideration of which, and of other valuable considerations, it is hereby mutually agreed between the Milwaukee, Lake Shore & Western Rail-

way company and the shipper of said live stock that the said company shall not be liable for any loss or damage or injury to said live stock from any cause whatever, whether by negligence of its agents or employés or otherwise, except such as may result from the collision of the train, or from cars being thrown from the track in course of transportation; and it is further agreed, that the owner shall load, unload, feed, water, and take care of said stock at his own expense and risk, and that he assumes all risk of injury or damage that the animals may in way or manner or from any cause sustain, except as above provided. It is further agreed that the liability of the company shall not, in any event, exceed one hundred dollars per head; and that all persons passed free, to accompany and care for the stock, will assume all risk of personal injury from any cause whatever, whether by negligence of the agents or employés or otherwise.

"Milwaukee, Lake Shore & Western Ry. Co.,

"by F. J. Gruber, Agent.

"Jos. Phelan, Shipper.

"Agents will note instructions on back hereof."

Indorsement on back:

"M., L. S. & W. Ry. Co. Live-stock Contract.

"From Harrison to Oshkosh. Nos. of cars, M., L. S. & W. 3204.

"I hereby certify that I am actually in charge of the live stock described within, and, in consideration that the M., L. S. & W. Ry. Co. transports me free on the same train with the stock, I hereby assume all risk of personal injury from any cause whatever. Rob't Lyness."

"I hereby certify that the above named are actually in charge of the live stock described within, and are entitled to pass on same train with it, under conditions named."

"F. J. Gruber, agent, Harrison Station."

On November 24, 1891, the plaintiff commenced this action, alleging, in effect, the incorporation and organization of the defendant, the making of such contract of shipment, and the payment of \$15 in consideration thereof; that the defendant delayed the transportation of said horses for a period of five hours or more after arriving at Antigo, and that the defendant so negligently and carelessly conducted and mismanaged in respect to the carrying of said horses, and its duty and calling as a common carrier, that it neglected and failed to give the plaintiff's servant in charge of said horses an opportunity to unload and feed the same, though requested so to do by said servant, and by reason thereof the said horses suffered for want of care and food, and became weak and faint; that

said eight horses were transported in the same car with eight other horses; that by reason of their faintness and weakness, so caused, they were unable to retain their standing or proper posture in said car, and were forced into cramped positions and attitudes, and thrown down, so as to necessitate their being twice unloaded during the transportation,—once at Elmhurst, and once at Eland Junction, on the line of the defendant's road; that when so unloaded the defendant refused, failed, and neglected to give said servant in charge an opportunity to feed and properly care for said horses while they were so unloaded, but immediately caused the same to be reloaded; that, in consequence of the defendant's careless and negligent conduct, three of said horses became sick and diseased, and died of the effects of said exposure and said want of care and protection; that two of them were the property of the said Richard Abrams, and the other the property of this plaintiff; that the loss of said horses was to the damage of the plaintiff and the said Richard Abrams in the sum of \$650; that afterwards, and before the commencement of this action, the said Richard Abrams, for a valuable consideration, duly sold and assigned to the plaintiff all his interest, claim, and demand against the defendant on account of the loss and death of said horses as aforesaid, and that the plaintiff is now the sole owner thereof; and demanded judgment in the sum of \$700, with costs and disbursements. The defendant answered by way of denials and admissions, and justified under said written contract.

At the close of the trial the jury returned a special verdict to the effect (1) that the loss or death of the plaintiff's said horses was caused by the negligence of the defendant or its employes; (2) that the value of each of two of said horses was \$200 each, and the other was \$250. That the court thereupon denied the motion of the defendant to set aside the verdict and grant a new trial; that the court thereupon denied the motion of the plaintiff for judgment upon and in accordance with the special verdict for the whole amount thereof, with costs, but ordered judgment upon the special verdict to be entered in favor of the plaintiff and against the defendant in the sum of \$300 and costs and interest from the commencement of this suit; that judgment was thereupon duly entered accordingly,—from which both parties appeal.

Felker, Stewart & Felker, for plaintiff.

Albert L. Cary and Bradley G. Schley, for defendant.

CASSADAY, J.—The jury found, as a matter of fact, in effect, that the horses came to their death by reason of the negli-

gence of the defendant. The horses were transported on the defendant's car for a distance of about 140 miles, and the time occupied by such transportation was about 34 hours. During that time the horses had no food nor drink. According to the testimony of those in charge of the horses, the defendant refused to give them any opportunity to take the horses from the car, and give them food and drink, though repeatedly requested so to do; that this was particularly so at Antigo, where the car remained about eight hours; that it was also true at other places; and that there were eight other horses in the same car, and it was impracticable to give them food and water without removing them from the car. It appears that the train reached Oshkosh about six hours behind schedule time. There is expert testimony to the effect that such exposure of the horses without food or drink probably induced the disease which caused their death. We must assume, therefore, that the evidence supports the verdict to the effect that the horses came to their death by reason of the negligence of the defendant.

The defense relied upon is that, by the written contract of shipment contained in the foregoing statement, the defendant was expressly exempted from all liability by reason of such negligence, and that the plaintiff thereby assumed all risk of such injury or damage. Such is, indeed, the contract, if we are to give literal effect to its language. In *Betts v. Trust Co.*, 21 Wis. 80, it was said by DIXON, C.J., in speaking of the transportation of live stock, that, "as to this species of property, we think it competent for the carrier to contract that the owner shall assume all risk of damage or injury from whatever cause happening in the course of transportation." This proposition covers more ground than the point actually decided in that case, but seems to be sustained by the earlier English cases, while the later English cases seem to hold a contrary doctrine. See *Richardson v. Railway Co.*, 61 Wis. 598, 599, 18 Am. & Eng. R. Cas. 530, and cases there cited. In *Morrison v. Construction Co.*, 44 Wis. 410, the only question involved, as stated by the present chief justice, was whether the company "was guilty of any negligence, carelessness, or fault which caused or produced the injury to the property of the plaintiff," and he concluded by saying, "From all that appears in the evidence, it was a mere accident, and unaccountable." *Richardson v. Railway Co.*, *supra*, was an action to recover damages for delay in furnishing cars for the transportation of hogs. It was there pretty strongly intimated, if not directly held, that a railway company was not

Sufficiency of
evidence to
support
verdict.

Limitation of
liability—
Cases consid-
ered.

under the same obligations to furnish cars for and receive, safely carry, and store live stock, as other ordinary inanimate freight, but that it might, to at least a certain extent, exact conditions upon such receipt, and limitations upon such liability. In that case the complaint was held bad on demurrer for failure to allege the customary terms or conditions and restrictions upon which the company was in the habit of receiving and shipping such live stock, or the requisite facts to create a liability under section 1798, Rev. Stat. In *Ayres v. Railway Co.*, 71 Wis. 372, 35 Am. & Eng. R. Cas. 679, it was held that "a railroad company engaged in the business of transporting live stock, and accustomed to furnish suitable cars therefor upon reasonable notice, whenever it can do so, and which holds itself out to the public as such carrier for hire, upon the terms and conditions prescribed in a special written contract with shippers, is a common carrier of live stock, with such restrictions and limitations of its common-law duties and liabilities as arise from the instincts, habits, propensities, wants, necessities, vices, or locomotion of such animals under the contracts of carriage." Within the rule thus suggested it was competent for this railroad company to stipulate with the owners of live stock that they should load, unload, feed, water and take care of the stock at their own expense. The contract in question contains such a stipulation. But the stipulation itself raised an implied obligation on the part of the defendant to furnish to such owners the requisite opportunities for so loading, unloading, feeding, watering, and taking care of such stock. This action is to recover damages for wilfully refusing or negligently omitting to perform that duty.

The question recurs whether the defendant, by the contract of shipment could lawfully exempt itself from liability for such negligence. This court has held that a common carrier of persons or property cannot by any agreement, however plain and explicit, wholly relieve itself from liability for injury resulting from its gross negligence or fraud. *Black v. Transportation Co.*, 55 Wis. 319; *Lawson v. Railway Co.*, 64 Wis. 455, 21 Am. & Eng. R. Cas. 249. The same rule has been applied to a passenger carried gratuitously by a railroad upon a pass containing such a stipulation. *Annas v. Railroad Co.*, 64 Wis. 46, 27 Am. & Eng. R. Cas. 102. So this court has repeatedly held that a telegraph company cannot, by such stipulation, relieve itself from liability for damages happening by the want of ordinary care of itself or servants. *Thompson v. Telegraph Co.*, 64 Wis. 531; *Hibbard v. Same*, 33 Wis. 558; *Candee v. Same*, 34 Wis. 471. In the leading case of *Railroad Co. v. Lockwood*, 17 Wall. 357, 384, Mr. Justice

BRADLEY discussed the subject with his accustomed learning and ability, and he and the whole court reached the conclusions: "(1) That a common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law; (2) that it is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants; (3) that these rules apply both to common carriers of goods and common carriers of passengers for hire, and with special force to the latter; (4) that a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire." In reaching such conclusions Mr. Justice BRADLEY said: "In regulating the public establishment of common carriers, the great object of the law was to secure the utmost care and diligence in the performance of their important duties,—an object essential to the welfare of every civilized community. Hence the common-law rule which charged the common carrier as an insurer. Why charge him as such? Plainly for the purpose of raising the most stringent motive for the exercise of carefulness and fidelity in his trust. * * * It is obvious, therefore, that if a carrier stipulate not to be bound to the exercise of care and diligence, but to be at liberty to indulge in the contrary, he seeks to put off the essential duties of his employment; and to assert that he may do so seems almost a contradiction of terms." *Id.* 377, 378. Accordingly, it was there held, in effect, that the railroad company could not abdicate the essential duties of its employment of carefulness and fidelity as such common carrier.

The doctrine of that case has frequently been sanctioned by the same court. *Liverpool, etc., Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 441, 442, 37 Am. & Eng. R. Cas. 681, and cases there cited. There are numerous adjudications in the state courts to the same effect. *Grogan v. Express Co.*, 114 Pa. St. 523, 30 Am. & Eng. R. Cas. 9; *Buck v. Railroad Co.*, 150 Pa. St. 170; *Lindsley v. Railroad Co.*, 36 Minn. 539, 31 Am. & Eng. R. Cas. 86; *Hull v. Railway Co.*, 41 Minn. 510, 40 Am. & Eng. R. Cas. 104; *Boehl v. Railway Co.*, 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; *Canfield v. Railroad Co.*, 93 N. Y. 532, 16 Am. & Eng. R. Cas. 152; *Railroad Co. v. Witty*, 32 Neb. 275; *Railway Co. v. Wynn*, 88 Tenn. 320, 45 Am. & Eng. R. Cas. 812; *McFadden v. Railway Co.*, 92 Mo. 343, 30 Am. & Eng. R. Cas. 17; *Galt v. Express Co.*, 48 Am. Rep. 742. Some of these cases involved the validity of such stipulation for exemption of liability in contracts for the carriage

of live stock, and, while they indicate that such contract for exemption might be made as against injuries resulting from the inherent nature or propensities of the animals without fault of the carrier. Yet they all hold that the carrier cannot by contract exempt itself from liability for the negligence of itself or its employes. Some of the cases cited go so far as to hold that where there is damage to the property so transported, the burden is on the carrier to show that it was free from negligence.

In *Annas v. Railroad Co.*, Mr. Justice TAYLOR reviewed the authorities, and, in effect, said that this court was committed to the rules of law held in *Railroad Co. v. Lockwood*, 17 Wall. 357, 67 Wis. 55, 27 Am. & Eng. R. Cas. 102. The doctrine of that case seems to be in harmony with what was said in *Richardson v. Railway Co.*, and *Ayres v. Same*, *supra*. Since those cases arose, and since the first was decided by this court, chapter 487, Laws 1887, has been enacted, expressly requiring every railroad corporation operating a road within this state to receive and carry live stock during eight months of the year, including March and April, and prescribing the conditions upon which such stock is to be carried; and, among other things, declaring that "said railroad company transporting such cars of live stock shall feed and water such stock as shall be unloaded under the provisions of this act at the expense of the railroad company where such stock shall be detained by them for a longer period than six hours." Sanb. & B. Ann. St. § 1799a.

There are numerous decisions by courts of high authority in conflict with the cases cited, but we must hold, what we regard as the better doctrine, that, in so far as the contract in question attempted to exempt the company from liability by reason of its own negligence or the negligence of its agents or employes, it is contrary to public policy, and void. This really disposes of all the questions raised upon the defendant's appeal calling for consideration. There are exceptions to the admission of certain testimony, as to the usual stop at Antigo, the usual time occupied for such transportation, the rules and orders of the company in respect to the shipping of live stock; but such testimony related to matters respecting which there was substantially no dispute, and under the admitted facts in the case they were of but very little significance. As often stated this court cannot reverse for errors which do not affect the substantial rights of the adverse party. Rev. St. § 2829.

The court refused to allow the plaintiff to take judgment for the value of the horses as found by the verdict. In doing

so the court gave effect to the clause of the contract wherein it was agreed that the liability of the company should not in any event exceed \$100 per head. It will be observed that that amount is not named as the value of each horse, and the contract contains no stipulation nor agreement as to the value of the horses, or any of them. In *Hart v. Railroad Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604, the plaintiff's recovery was limited to his "agreed valuation" in the contract. The same was true in *Graves v. Railroad Co.*, 137 Mass. 33, where it was held "that the shipper was estopped to claim more than the agreed valuation of the goods." To the same effect: *Hill v. Railroad Co.*, 144 Mass. 86, 228 Am. & Eng. R. Cas. 87; *Brown v. Steamship Co.*, 147 Mass. 58, 55 Am. & Eng. R. Cas. 357; *Alair v. Railroad Co.*, 53 Minn. 160. But where, as here, there is an absence of any agreed valuation in the contract, and the limitation is merely as to the amount of recovery for damages caused by the defendant's negligence, the case comes within the general rule to the effect that the company cannot contract for exemption, either in whole or in part, from liability for the negligence of itself or its employes. *Id.*: *Boehl v. Railway Co.*, 44 Minn. 191, 45 Am. & Eng. R. Cas. 351; *McFadden v. Railway Co.*, 92 Mo. 344, 30 Am. & Eng. R. Cas. 17; *Weiller v. Railroad Co.*, 134 Pa. St. 310, 42 Am. & Eng. R. Cas. 390; *Ashendon v. Railway Co.*, 5 Exch. Div. 190, 31 Moak. Eng. Rep. 644; *Dickson v. Railway Co.*, 18 Q. B. Div. 176, 28 Am. & Eng. R. Cas. 92. This is in harmony with the rule held in *Black v. Transportation Co.*, 55 Wis. 319.

It is to be remembered that the shipper and the railroad company do not contract upon equal terms. Practically the shipper is bound to submit to whatever conditions are exacted by the carrier. To be lawful, such conditions must be reasonable. A contract relieving a carrier wholly or partially from liability for damage caused by its own negligence is unreasonable. We must hold that the plaintiff was entitled to judgment for the amount of his verdict. The result is that the exceptions of the defendant are overruled, and the judgment is affirmed so far as involved in its appeal. By the court: On the defendant's appeal, the judgment is affirmed; on the plaintiff's appeal the judgment is reversed, and the cause is remanded, with direction to render judgment in favor of the plaintiff and against the defendant for the full amount of the verdict as damages.

Limitation of Liability of Carriers of Live Stock.—See *Union Pacific R. Co. v. Rainey*, *ante*, p. 302, and references in note, p. 307.

Breach of Contract for Carriage of Live Stock.—See *Terre Haute & Logansport R. Co. v. Sherwood* (Ind.), 55 Am. & Eng. R. Cas. 326, and note, 336.

Provision in Contract for Transportation Requiring Shipper to Feed and Water Stock.—*Obligation of Carrier to Furnish Opportunity to care for Stock.*—In *Smith v. Michigan Cent. R. Co.*, 100 Mich. 148, it was held that a railroad company which accepts horses for transportation under a contract of shipment, which requires the shippers to load and unload, and feed, water, and otherwise care for the animals shipped at their expense and risk, is bound to furnish the shipper an opportunity to give the animals the care which they require. *Citing Express Co. v. Phillips*, 29 Mich. 515.

Action for Delay and Failure to Furnish Opportunity to care for Animals—Pleading and Proof.—In *Smith v. Michigan Cent. R. Co.*, 100 Mich. 148, it was insisted that as the declaration charged both delay and failure to furnish opportunity for feeding and watering horses in the course of transportation, and as neither alone would have caused the death of the animal therein charged, it became necessary for the plaintiff, not only to prove both elements, but to show that the carrier had omitted to perform its duty in both particulars, that as there was no liability on the part of the defendant for the delay of trains, one of the essential elements of the proximate cause could not be charged against it, and that therefore the case must fail, and it was held that the plaintiff was under no obligation to prove that the delay was wrongful, if the denial of an opportunity to feed and water the horses was wrongful in view of such delay.

Construction of Statute Requiring Carriers to Feed and Water Live Stock—Application to Interstate Shipments.—In *Gulf, C. & S. F. R. Co. v. Gray* (Tex. Nov. 19, 1894), 28 S. W. Rep. 280, it was held that Art. 284, of the Revised Statutes of 1879, requiring carriers of live stock to feed and water the stock "during the time of conveyance, and until the same are delivered to the consignee," or sold as unclaimed, as further provided by the act, refers solely to shipments within the state. The court said: "The language of this article appears to apply only to shipments wholly within the state. It requires the carrier 'to feed and water the same during the time of conveyance and until the same is delivered to the consignee or disposed of as provided in this title.' If it applies to interstate shipments, then the language, 'during the time of conveyance and until delivered to the consignee,' would seem to require the feeding and watering after the stock left Texas and until delivered by the carrier at destination. This would be beyond the power of the legislature, for its law could not be effective beyond the state line. The language, 'or disposed of as provided in this title,' seems to limit the law to state shipments; for when we examine the provisions of title 13 of the Revised Statutes, of which said article 284 is a part, we find that article 288 of said title provides that, 'should any live stock remain unclaimed for the space of forty-eight hours after its arrival at the place of its destination, the carrier may sell the same,' and then proceeds to provide the manner of sale and disposition of proceeds. The 'place of its destination,' where the sale is provided for, must be some point in Texas, for we could not suppose the legislature would undertake to authorize and provide for the manner of sale of property at a point outside of the state. Considering the policy of our legislature, the fact that the regulation of interstate shipments is peculiarly within the province of congressional legislation, and that congress did make full and apparently complete regulations on the subject, the fact that there was no apparent demand for state regulation of interstate shipments, and that there was a demand for such regulation of shipments entirely within the state, and that after congress acted the state legislature enacted said law, which on its

face bears strong evidence of a purpose to apply its provisions only to shipments entirely within the state, we feel that it would be doing violence to the intention of the legislature to extend by construction the provisions of said article 284 to the interstate shipment in question, and thereby bring it into possible conflict with the acts of congress."

FT. WORTH & DENVER CITY R. Co.

v.

DAGGETT.

(*Texas Supreme Court, November 26, 1894.*)

Right of Shipper to Rescind Contract for Transportation Because of Delay.—The negligence of a railroad company in stopping and unloading a shipment of cattle two hours after they have been placed on the train, does not give the shipper the right to rescind a special contract for transportation, whereby he is to feed and water the stock without reference to the *quantum* of injury inflicted upon the cattle by such negligence.

Same.—Such a rescission is not justified where it appears that no serious damage could have resulted from the delay if the cattle had been properly fed and watered.

Same—Relief of Person in Charge of Stock from Duty to Feed and Water.—The person in charge of the stock was not relieved from the duty of feeding and watering since the attempted rescission was ineffectual, and because section 4387 Rev. Stat. U. S. imposes upon persons in charge of stock the duty of feeding and watering the same, consequently under the circumstances he could not divest himself of the duty imposed by the statute.

Chargeability to Owner of Negligence of Person in Charge of Stock.—The failure of the person in charge of the stock to feed and water when reasonable facilities were offered by the carrier, was negligence chargeable to the owner of the stock.

Duty of Carrier to Feed and Water—Duty to Furnish Reasonable Facilities to Shipper.—The special contract entered into by the shipper and the company, whereby the former was to feed and water, as well as the act of congress, relieved the carrier of the duty in the first instance of feeding and watering at such points as it furnished reasonable facilities for the shipper to do so, but in the absence of such facilities at any point, the contract would be unreasonable as to such point, and the carrier would be liable for any damage resulting from the failure to feed and water at such point.

Effect of Abandonment of Stock by Person in Charge Thereof and his Becoming Agent of Company on Shipper's Duty to Feed and Water.—The abandonment of the cattle and of the service of the owner by the person in charge of the stock, who, thereafter, became the agent of the railroad company, did not relieve the owner from the duty of feeding and watering as required by the contract, as well as by the statute, and he was guilty of negligence in failing to make any arrangement to perform such duty.

Measure of Damages.—If the delay resulted solely from the negligence of defendant, plaintiff was entitled to recover for such damage as he

suffered by reason of any decline in the market prices between the time the cattle should have reached the point of destination and the time they did so reach it, and also for any damage to the cattle which would have resulted from such delay, even if they had been properly fed and watered, and if the company failed to provide reasonable facilities for feeding and watering at the place where the delay occurred, and plaintiff or his agent could not, by the use of reasonable means, have fed and watered at that place, the plaintiff was entitled to recover for such damage as resulted to the cattle from want of feed and water at that point, and which could not have been prevented by properly feeding and watering as soon as the cattle reached a place where it reasonably could have been done.

ERROR to court of civil appeals, second supreme judicial district.

Stanly, Spontz & Meek and *Carrigan & Hughes*, for plaintiff in error.

C. C. Cummings, for defendant in error.

DENMAN, J.—Plaintiff, J. P. Daggett, sued the Wichita Valley Railway Company and the Ft. Worth & Denver City Railway Company on their common-law liability as common carriers to recover damages resulting to plaintiff on a shipment of 259 head of beeves, from Dundee, Archer county, Tex., to Chicago, Ill., by reason (1) of delay in shipment, the market being alleged to have declined during the delay; (2) of mixing the cattle which had been classified for market; and (3) of failure to feed and water the cattle during transit. Case stated.

Defendants pleaded that the cattle were shipped under a special contract, whereby plaintiff (1) released the carriers from any damage resulting from delay, and (2) agreed at his own risk to feed and water, load and unload, the cattle whenever they should be unloaded and reloaded for any purpose during transit.

Defendants also pleaded, among other things, that the injuries to the cattle resulted from the negligence of plaintiff and his employes in deserting the cattle, and refusing to give them proper attention.

The case was tried before the court, without a jury.

C. B. Daggett testified for plaintiff that, as an employé of plaintiff, he graded, and loaded accordingly, said cattle on the Wichita Valley Railway between 8 and 9 o'clock P.M., July 23, 1891, and thereupon, in company with "another hand," boarded the train to go with said cattle to Chicago, for the purpose of taking care of them during transit; that when he reached Wichita Falls, about 10 o'clock that night, he learned of a wreck ahead on the Ft. Worth & Denver City Railway, and that the cattle would be detained some time thereby, and thereupon he and the "other hand" left the

cattle, and did not see them any more until next morning, when he learned that they had been mixed in the pen in unloading them during the night; that he did not feed or water, nor suggest that the cattle needed feed or water, while they were at Wichita Falls, although he said they could have been watered there by driving to a tank near the pen or to the river; that the agent of the Ft. Worth & Denver City Railway Company, on that day, at Wichita Falls, requested him to assist in regrading and loading the cattle, which he refused to do, for the reason that it could not be done in the stock pens, and he did not know all the brands; that, about 6 o'clock in the evening of July 24th, the cattle, having been loaded, started on the Ft. Worth & Denver City Railway to Ft. Worth; and that he and the other hand went with the cattle, arriving at Ft. Worth about 2 o'clock next morning, where they remained about two or three hours, and left about 6 or 7 o'clock on the Texas & Pacific Railway for Texarkana (a distance of about 253 miles), at which place they arrived on the evening of the next day, July 25th, where the cattle were fed and watered for the first time since they were shipped at Dundee, on the evening of July 23d.

This witness further testified "that he owned an interest in said cattle," but did not state the extent of such interest, etc.; "that he went from Wichita Falls to Chicago as agent of defendant at the request of the defendant," that while at Wichita Falls, and at two or three places between Wichita Falls and Ft. Worth, the cattle could have been watered on the cars, but he did not water them, nor ask that it be done, because he did not think they needed it, and thought they would do very well without food or water until they reached Texarkana; that at Ft. Worth there were ample facilities for feeding and watering the stock, both in the stockyards of the Ft. Worth & Denver City Railway Company, and in those of the Texas & Pacific Railway Company; but that he neither watered and fed the stock there, nor requested that it be done, because he thought it was not necessary, and that they would make it all right to Texarkana, where he expected to feed and water them; but that when he arrived in Texarkana, and found the cattle much damaged, and some of them dead for want of feed and water, he "found that he was mistaken in thinking that they could make it to Texarkana all right without feed or water."

No one does or could deny that the cattle were greatly damaged by the cruel treatment detailed above. The court below rendered judgment for plaintiff for such a sum as to show conclusively that it included all damage done to the cattle between Dundee and Texarkana.

The court of civil appeals (HEAD, J., dissenting) affirmed the judgment, upon the ground:

(1) That the delay at Wichita Falls was occasioned by the negligence of the Ft. Worth & Denver City Railway, defendant, in permitting a collision between one of its trains and a bull.

(2) That such negligent delay, in law, conferred upon C. B. Daggett, agent of plaintiff, the right to rescind the special contract under which the cattle were shipped.

(3) That C. B. Daggett did at Wichita Falls rescind said contract, and that thereby plaintiff was relieved of the duty imposed upon him by the contract of feeding and watering the cattle.

(4) That, upon the rescission of the contract, the common-law duty of feeding and watering the cattle devolved upon defendants.

(5) That C. B. Daggett proceeded with the cattle from Wichita Falls as the agent of defendants, and not of plaintiff, and that, therefore, his negligence in failing to feed and water was the negligence of defendants.

This is an analysis of the opinion as we understand it. The record shows that this was an interstate shipment, and that, by the terms of the shipment, it was understood between plaintiff and defendants that plaintiff would send some one with the cattle to attend to feeding and watering, loading and unloading, during the trip, and to such shipment we will confine our remarks. The assignments of error are sufficient to question the correctness of each of the grounds above stated as the basis of the opinion of the court of civil appeals, and we will discuss them in their order.

We cannot say as a matter of law that there was no evidence to support the finding that the delay at Wichita Falls was negligence on part of the Ft. Worth & Denver City Railway. The very fact of stopping and unloading after the cattle had only been on the train about two hours was some evidence of negligence. The long delay was evidence of negligence, and so was the fact that the company's agents allowed the train to collide with the bull. This court does not pass upon the sufficiency of the evidence.

Assuming that defendants were guilty of negligence in unloading or delaying at Wichita Falls, does it follow that plaintiff had the right, by reason thereof, to rescind the special contract of shipment without reference to the *quantum* of injury inflicted upon the cattle by such negligence?

The general rule is that, where one is injured by the negligence of another, the person injured must use all reasonable

means at his command to avert or lessen the damage which would otherwise result from such negligence, and his failure to do so will limit his recovery to such damages as would have resulted from such negligence had such means been used, plus such a sum as would reasonably have been expended in the use of such means. The failure to use such means would be contributory negligence only as to such portion of the injury and resulting damages as would have been averted by the use thereof, less the reasonable cost of such means, and therefore could only prevent a recovery to that extent. This rule of law does not, however, require the injured party to do a vain thing in attempting to avert the consequences of the negligent act of another. Therefore, if it reasonably appears that the reasonable cost of such means, added to the damages which would not probably be averted by the use thereof, would equal or exceed the damages which could reasonably be expected to result from the negligent act, then the party whose property has been or is threatened to be injured by such negligent act would be excused from the use of such means, and could recover the entire damages resulting from such negligent act, and, if the property were destroyed or rendered valueless thereby, could abandon the same, and recover the full value thereof.

It results from the above that it is not the negligence of the carrier, but the extent of the injury that might have been reasonably expected to flow therefrom, and the amount of expense which might have been reasonably expected to be incurred in the attempt to avert same, which must be looked to in determining whether the shipper in this case had the right to rescind the contract of shipment, and refuse to feed and water the stock, as he had agreed to do, on account of the negligent delay at Wichita Falls.

It appears from the record that if the cattle had been properly fed and watered at Wichita Falls, or even at Ft. Worth, the damages would have been, to a great extent, averted. In fact it does not appear therefrom that any serious damage would have resulted from the delay if the cattle had been properly fed and watered at either or both of said places. We are therefore of opinion that the trial court and court of civil appeals erred in holding that such delay at Wichita Falls, in law, justified plaintiff's agent, C. B. Daggett, in rescinding the contract under which the cattle were shipped.

We are further of the opinion that said courts erred in holding that, by such delay and attempted rescission, plaintiff
Same. was relieved of the duty of feeding and watering
the stock, because the attempted rescission was
ineffectual, and left the contract in full force and because the

act of congress, independent of any contract, imposed upon the person in charge of the stock the duty of feeding and watering same, of which duty he could not divest himself under the circumstances detailed in his testimony above; and his failure to perform such duty, when reasonable facilities were furnished by the carrier, was negligence, chargeable to his principal. Rev. St. U. S. § 4387.

We are further of opinion that the special contract, as well as said act of congress, relieved the carrier of the duty, in the first instance, of feeding and watering at such points as it furnished reasonable facilities to the shipper to do so, but that, in the absence of such facilities at any point, the contract would be unreasonable as to such point, and the carrier would be liable for any damage resulting from the failure to feed and water at such point.

Reasonableness
of contract—
Liability of
carrier.

We are further of the opinion that C. B. Daggett continued throughout the agent of plaintiff, and that his negligence was chargeable to plaintiff. If, however, it be conceded that C. B. Daggett abandoned the cattle and the service of plaintiff, J. P. Daggett, at Wichita Falls, and was no longer his agent, but became the agent of the carrier, then plaintiff, J. P. Daggett, was guilty of negligence in failing to make any arrangement to perform the duty of feeding and watering, as required of him both by the special contract and the statute above cited. While the agent, C. B. Daggett, might abandon the service of his master, he was powerless to relieve him of the duty imposed by the contract and the law. The failure to perform this duty was negligence. It can avail him nothing to show that the carrier was also guilty of negligence. We are of opinion that there was error in holding that J. P. Daggett was not guilty of negligence in failing to feed and water the cattle at such places as the carrier provided reasonable facilities.

Abandonment
of service.

Under our view of the law of the case, it is not necessary for us to express an opinion as to whether C. B. Daggett could in any event be relieved of the effect of his negligence as far as he was interested in the cattle, and whether, as to such interest, the plaintiff, J. P. Daggett, was placed in any better position by virtue of the agreement that plaintiff is entitled to recover for whatever damages defendants are liable. We cannot assent to the proposition urged by appellant that the judgment should be here rendered for it, upon the ground that there is no evidence of negligence on its part, or, if there is, then plaintiff was guilty of contributory negligence. If the total damage resulted from different injuries, produced by separate and distinct causes, some of which were the negli-

gent acts of plaintiff alone or of plaintiff and defendants combined, but some were the negligent acts of defendants or either of them, without contributory negligence on part of plaintiff or his agent, then, for the damage reasonably resulting from the latter class of causes, plaintiff should recover, under the principles herein discussed.

If the delay on appellant's road resulted solely from its own negligence, as we think the court below was authorized to find, then plaintiff was entitled to recover for such damage as he suffered by reason of any decline in market price be-

Measure of damages. tween the time the cattle should have and did reach the point of destination, and also for any damage to the cattle which would have resulted from such delay, even if they had been properly fed and watered; and if appellant failed to provide reasonable facilities for feeding and watering at Wichita Falls, and plaintiff and his agents could not, by the use of reasonable means, have fed and watered at that place, then plaintiff is also entitled to recover for such damage as resulted to the cattle from want of feed and water at that point, and which could not have been prevented by properly feeding and watering by plaintiff as soon as the cattle reached a place where it could have reasonably been done.

While the contract exempts appellant "from liability of every kind after said live stock shall have left its road," nevertheless, if the injury were inflicted on appellant's line, under circumstances rendering it liable to plaintiff under the principles above stated, plaintiff would be entitled to recover all damages reasonably flowing therefrom, and which he could not have averted under the principles above stated, even though such damage developed or became apparent after leaving appellant's line.

If plaintiff's agent, under all the circumstances, was not guilty of negligence in failing to be present when the cattle were unloaded and the grades mixed at Wichita Falls, and the selling price was diminished by such mixing of grades, then plaintiff can recover such portion of the damages resulting therefrom which could not reasonably have been averted by regrading the cattle. We cannot say as a matter of law that no damage would have resulted to the cattle by regrading them in the pens.

The judgment is reversed, and the cause is remanded for the errors above indicated.

Measure of Damages for Delay in Transportation of Live Stock.—See *Hudson v. Northern Pacific R. Co.*, *post*, 329, and note, 335.

HUDSON *et al.*

v.

NORTHERN PACIFIC R. Co.

(*Iowa Supreme Court, October 19, 1894.*)

Waiver by Carrier of Stipulation as to Presentation of Claim for Damages and as to Removal of Stock—Province of Jury.—Plaintiff presented a claim for damage to stock to the general freight agent of a railroad company, and, by direction of the latter, left the claim with him. Thereafter the agent wrote to the plaintiff rejecting one portion of the claim, but offering to pay the other portion thereof. *Held*, that there was sufficient to allow plaintiff to go to the jury upon the question as to whether or not the defendant had waived a provision in the contract of transportation exempting it from liability for loss or damage unless the shipper gave notice in writing of his claim therefor to some officer of the company, or to its nearest agent, before removal of the stock from the place of destination or its mingling with other stock.

Same—Effect of Filing Claim after Expiration of Time Limited by Stipulation.—The fact that the waiver was not made until after the time had expired for giving notice was immaterial, where it appeared that the general agent of the company treated its liability as still existing, and directed the plaintiff to go to the trouble and expense of filing his statement and claim for damages.

Construction of Contract of Transportation—Law of Place.—The validity of a contract for transportation of live stock is to be determined by the laws of the state wherein it was entered into.

Same—Right of Carrier to Limit its Liability for Negligence in Absence of Statutory Permission.—Where a contract for the transportation of live stock is made in a state which has no statutory provisions on the subject, the rule of the common law as to the liability of common carriers will govern, and a stipulation in a contract relieving the carrier from responsibility for delay occasioned by its negligence will not constitute a defense to an action for such delay.

Sufficiency of Evidence of Damage.—The evidence (which is not detailed) was sufficient to justify the jury in finding that, because of improper yard facilities and improper feed and insufficiency of water, there was a shrinkage caused in the weight of the cattle, and also that the stock was not transported within a reasonable time.

Measure of Damages for Delay in Transportation.—The measure of damages in an action for delay in the transportation of stock is the difference between its market value at its destination at the time it should have arrived, and the time of its actual arrival.

Proof of Damages for Delay in Transportation—Prices at Points other than Place of Destination.—For the purposes of showing the market prices of cattle shipped, the delivery of which is alleged to have been unreasonably delayed, prices of the same class of cattle at other points is admissible, if it is also shown that such prices are relatively the same.

Competency of Witness to Testify to Market Prices.—A witness who bases his opinion upon market reports and quotations is competent to testify as to market prices.

APPEAL from Woodbury county district court.

Swan, Lawrence & Swan, for appellant.

Joy, Call & Joy, for appellee.

DEEMER, J.—On the 13th day of July, 1891, the plaintiff, through his agents, delivered to the defendant, at Genesee, Idaho, for shipment to Sioux City, Iowa, 13 car-loads of cattle, consigned to "Wyatt & Hopkins," for sale on the general market for the account of plaintiff. The cattle were received by the defendant, and it undertook to transport them, as a common carrier, to their point of destination. They did not reach Sioux City until about midnight of the 21st or early morning of the 22d day of July.

The plaintiff claims that the cattle were delayed on the way, by reason of the negligence of the defendant, its agents and employes, for an unreasonable length of time, and that by reason thereof, he was damaged in the shrinkage of the animals, decline in the market price, and in expense in caring for them during the delay, in the aggregate sum of \$1988.75.

The defendant, while admitting the receipt of the cattle, alleges that it did so under a contract with Wyatt & Hopkins which provided, among other things: "The said railroad company shall not be liable for the loss or death of, or for any injuries received by, any of such stock, unless the same is immediately caused by the wilful misconduct or the actual negligence of said company, or its agents, servants, or employes. The said shipper further agrees that, as a condition precedent to his right to recover any damages for loss of or injury to any of said stock, he will give notice in writing of his claim therefor to some officer of the said railroad company, or to its nearest station-agent, before said stock has been removed from the said place of destination, and before such stock has been mingled with other stock."

It provided further: "The shipper hereby assumes all risk of damage which may be sustained by reason of any delay in such transportation, not resulting from the wilful negligence of the railroad company."

It avers that this contract was entered into in Idaho, and that it was lawful under the laws of that state, and binding upon the parties; that the alleged delay in the shipment of the cattle was not due to any want of care, or carelessness, on the part of the defendant, its agents or employes, but the damage, if any, caused by the delay, was assumed by the plaintiff, or occasioned by his carelessness and neglect.

Defendant further says, in answer, that plaintiff did not give the notice in writing of his claim for loss or injury, as provided by the contract.

The plaintiff, in reply, admitted the making of the contract, but denies its validity, and further admits that he did not give the notice required by the contract of his loss and injury, but alleges that the defendant waived the same.

On the issues thus joined, the case was tried to a jury, which returned a verdict for plaintiff, on which judgment was rendered, and defendant appeals.

Although 41 errors are assigned, defendant, in argument, discussed but few of them; and, under the well-known rules of this court, we will consider those only which are argued, the others being waived.

It is first urged that there was not sufficient testimony of waiver of the provisions of the contract requiring notice to be given the company by the plaintiff of loss or injury to his stock. This question is presented by the assignment of errors wherein it is claimed that the court erred in not giving to the jury the ninth instruction asked by it, to the effect that the proof introduced did not, as a matter of law, amount to a waiver.

Waiver of
stipulation as
to claim.

The court instructed the jury that the contract was binding upon the plaintiff, but that the defendant might waive its provisions, and gave them proper rules to determine what would constitute a waiver. This instruction was not properly excepted to, and the evidence adduced to support a waiver, except as to one particular item, was received without objection. There is no assignment in the record that the testimony does not support the waiver, except as it arises upon the exception to the refusal of the court to give the instruction asked. We will assume, however, that the question is properly presented, and turn our attention to the question as to whether there was sufficient evidence to support the alleged waiver.

It appears from the testimony that after the receipt of the cattle, and some time early in August, plaintiff went to St. Paul and saw Mr. Moore, the general freight agent of the defendant company. He was at that time the head of defendant's entire freight-shipping business. Plaintiff related the facts of the case to him and told him he had sustained a loss. Moore told plaintiff to make out a statement of his damages, or to go to Mr. Harrington, the general claim agent. Moore took plaintiff to Harrington and told him that he (plaintiff) had a claim against the company, and to have plaintiff make out a bill for his damages, and the loss he had sustained; and, if they found plaintiff entitled to any damages, they would ad-

just it at once. Plaintiff made out a claim and left it with the claim agent, at this interview.

Afterwards the claim agent wrote plaintiff the following letter (Exhibit 1):

"St. Paul, Minn., Nov. 20, 1891.

"Messrs. W. C. Hudson & Co., Sioux City, Iowa—Gentlemen:

"Referring to your claim of August 6, 1891, for \$1988.75, I have investigated this matter thoroughly, and have laid the claim before our general freight agent, and also before our law department. The law department is of the opinion that we are in no wise liable for the amount of the claim. I am directed, however, by Mr. Moore, the general freight agent, to say to you that we will refund the extra expenses, account of feed, etc., at the time the delay occurred. Let me know if this is satisfactory. Give me total amount of extra expenses thus incurred, and I will have check sent you at once.

"Yours truly,

"Fred Harrington, F. C. A."

We are of opinion that these facts were sufficient evidence of a waiver on the part of the defendant, and of its right to insist upon the notice required by the contract, assuming it to be valid, to justify the court in submitting the question to the jury. Such forfeitures are not favored in law, and "courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted." Any agreement, declaration, or course of action on the part of him who is to be benefited by the contract, which leads the other party to believe that, by conforming thereto, the forfeiture will not be incurred, will and ought to estop the promisee from insisting on the forfeiture. *Insurance Co. v. Eggleston*, 96 U. S. 577; *Insurance Co. v. Doster*, 106 U. S. 30; *Lyon v. Insurance Co.*, 55 Mich. 141. Waiver is where one in possession of any right, whether conferred by law or contract, and of full knowledge of all the material facts, does, or forbears the doing, of something inconsistent with the existence of the right, and of his intention to rely upon it; and thereupon he is said to have waived it; and he is precluded from claiming anything by reason of it afterwards. Bish. Cont. § 792.

The provision in the contract in question was for the benefit of the defendant, and it might elect to rely on it or not, as it saw fit. If it so conducted itself as to evince an intention not to rely thereon, and induced the plaintiff to go to the trouble and expense of making out his claim for damage, in accordance with the suggestion of its general freight agent, it is now estopped from insisting on the forfeiture. *Hollis v. Insurance*

Co., 65 Iowa, 454; *Titus v. Insurance Co.*, 81 N. Y. 410; *Insurance Co. v. Norton*, 96 U. S. 234.

In the case of *Titus v. Insurance Co.* the court, in speaking of a waiver of forfeiture in insurance policies, says: "But it may be broadly asserted that if, in any negotiations or transactions with the assured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue thereof, to do some act, or to incur some trouble or expense, the forfeiture is, as a matter of law, waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based upon any new agreement or an estoppel."

Citing Allen v. Insurance Co., 12 Vt. 366; *Webster v. Insurance Co.*, 36 Wis. 67. See also *Roby v. Insurance Co.*, 120 N. Y. 510; *Grubbs v. Insurance Co.*, 108 N. Car. 472; *Insurance Co. v. Kittle*, 39 Mich. 51; *Carpenter v. Insurance Co.*, 61 Mich. 635. The same doctrine applies to waivers of forfeiture in leases (Tayl. Landl. & Ten. [5th Ed.] §§ 287-749; 1 Smith, Lead. Cas. 20, A); and to waivers of notice required by telegraph companies of claims for damage (*Hill v. Telegraph Co.*, 85 Ga. 425; *Telegraph Co. v. Stratemeier*, 6 Ind. App. 125; *Telegraph Co. v. Yopst* [Ind. Sup.], 21 Am. & Eng. Corp. Cas. 88, 25 Am. & Eng. Corp. Cas. 519, 118 Ind. 248. The case of *Massengale v. Telegraph Co.*, 17 Mo. App. 257, does not announce a contrary rule.

In that case the sender of the message was put to no trouble or expense at the request of the company. The general agent of the company merely promised to look into the matter. The fact that the waiver in this case was not made until after the time had expired for giving notice is not controlling, for the defendant's general agent treated the liability of the company as still existing, and directed the plaintiff to go to the trouble and expense of filing his statement and claim for damages. At least, there was testimony authorizing the jury to so find. The claim agent, in refusing to pay the plaintiff's claim, did not put it on the ground that no notice had been given, but denied liability for the loss.

2. It is next urged that under the contract of shipment, which was made in Idaho, the plaintiff assumed all risks and damage in the shipment of the cattle not growing out of the wilful negligence of the railroad company; that there is no statute in Idaho making such contracts illegal, and therefore it is in full force and effect; and that there is no proof that the delay was due to the wilful neglect of the company. The contract having been made in Idaho, to be partly performed there, its validity is to be determined by the laws of that

Construction
of contract of
transporta-
tion.

state. *Talbot v. Transportation Co.*, 41 Iowa, 247; *Fairchild v. Railroad Co.*, 148 Pa. St. 527; *Hart v. Railroad Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; *Hazel v. Railway Co.*, 82 Iowa, 477, 49 Am. & Eng. R. Cas. 76.

As there is no statute in Idaho regulating such a contract, and as from the proofs it appears there have been no decisions upon the subject, we will presume the common law is in force there. Under the common law a carrier may, by special contract, limit its liability as an insurer, as for the loss of goods by fire and other casualties which are not the result of its negligence; yet it cannot restrict it so as to excuse itself from loss or damage resulting from the negligence of its servants or agents. 3 Wood, Ry. Law, 1885; *Railroad Co. v. Lockwood*, 17 Wall. 357; *York Co. v. Illinois Cent. R. Co.*, 3 Wall. 107; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Hart v. Railroad Co.*, 112 U. S. 331, 18 Am. & Eng. R. Cas. 604; *Shriver v. Railroad Co.*, 24 Minn. 506; *Hoadley v. Transportation Co.*, 115 Mass. 304.

There was sufficient testimony to justify a finding by the jury that the delay was due to the breaking down of a bridge on the defendant's line of way, near Spokane, in Washington, and that the bridge went down by reason of the negligence of the defendant, in allowing the timbers to become rotten, defective, and out of repair. The defendant could not, as we have shown, relieve itself from responsibility for damages occasioned by the delay, if this delay resulted from its own negligence; and the stipulations in the contract of affreightment are no defense to this action.

3. After the discovery of the broken bridge at Spokane, the train which was carrying plaintiff's stock was unloaded at the town of Sprague, Idaho, and the cattle turned into defendant's stock-yards at that place. It is claimed by plaintiff that these yards were too small; there was not sufficient room in which to feed and water the stock; that the watering-trough was too small, the feed scarce, poor, and unfit for cattle; and that he was obliged to go outside and buy feed at his own expense; that, by reason of the condition of the yards and the lack of water and feed, the cattle shrunk in weight, and his damage was augmented.

Defendant insists that there is a lack of testimony to sustain these claims of the plaintiff. From a careful reading of the testimony, we are convinced there was sufficient evidence on these points to justify the verdict by the jury, if it were based upon these grounds. It is also contended by defendant that there is no evidence showing that the cattle were not transported within a reasonable time. With this conten-

tion we cannot agree, for, in our opinion, there was ample evidence on this proposition. It would serve no useful purpose to set it out in this opinion, which is already growing too long, and the parties must be content with our conclusion.

4. Plaintiff claims, as an element of damage, depreciation in the value of the cattle between the 18th day of July, when the cattle should have arrived had the defendant been diligent, and the time when they did in fact arrive. Upon the arrival of the cattle in Sioux City, they were reshipped to and sold in South Omaha. When they reached South Omaha, about one half of them were classified and sold as beef-cattle, and the remainder as feeders. It was shown by the testimony that the market price of beef-cattle at Sioux City, South Omaha, and Chicago was relatively the same, and that the Sioux City market was controlled by the Chicago and South Omaha markets, allowing the difference in freight. It was also shown that there was no market for feeders in Sioux City on the 21st of July.

Elements of
damages.

Witnesses were allowed, against defendant's objections, to state the market price of these cattle at Sioux City, South Omaha, and Chicago on the 18th day of July and on the 21st; and this is complained of as error.

We think the rulings were correct. Of course, the ultimate question for the jury to determine in case there was delay in the shipment was the difference in the market value of the cattle at Sioux City, Iowa (the place of delivery), on the 18th and 21st days of July; but testimony as to the market price at South Omaha and Chicago on these days was proper to go to the jury, under the facts disclosed as evidence bearing upon the market price at Sioux City. *Lowell v. Commissioners*, 146 Mass. 403, 23 Am. & Eng. Corp. Cas. 349; *Cahen v. Platt*, 69 N. Y. 348.

Witnesses were allowed to testify as to values, who based their opinions upon market reports and quotations. Such a witness is competent to speak as to values. *Sisson v. Railroad Co.*, 14 Mich. 189; *Peter v. Thickstun*, 51 Mich. 589; *Railroad Co. v. Perkins*, 17 Mich. 296.

Competency of
witness.

We have endeavored, as best we may, to cover every point made in the defendant's argument, and our conclusion is that there is no prejudicial error in the record; and the judgment is affirmed.

Delay in Transporting Live Stock—Measure of Damages.—See *Ft. Worth & D. C. R. Co. v. Greathouse* (Tex.), 49 Am. & Eng. R. Cas. 157, and note 165.

Limitation of Liability of Carriers of Live Stock.—See *Union Pac. R. Co. v. Rainey*, *ante*, p. 302, and references in note, p. 307.

Stipulation for Notice of Claim for Loss or Damage.—See *Western Railway of Alabama v. Harwell* (Ala.), 45 Am. & Eng. R. Cas. 358, and note 367.

Burden of Proof Against Carrier which has Limited Its Liability.—See *Western Railway of Alabama v. Harwell* (Ala.), 45 Am. & Eng. R. Cas. 358, and note 367.

Contracts for Transportation of Live Stock.—*Limitation of Liability for Negligence of Carrier.*—In *Wabash R. Co. v. Brown*, 152 Ill. 484, it was held that a carrier of live stock cannot relieve itself by contract from liability for any portion of a loss sustained by the consignor upon goods in its, the carrier's, possession, for the purposes of transportation, where such loss results from its gross negligence. *Following Railway Co. v. Chapman*, 133 Ill. 96, 42 Am. & Eng. R. Cas. 392.

In *Armstrong v. United States Exp. Co.*, 159 Pa. St. 640, it was held that an express company cannot release itself from liability for damages caused by the negligent transportation of live stock.

Limitation of Liability for negligence of Connecting Line.—In *McCann v. Eddy* (Mo., June 30, 1894), 27 S. W. Rep. 541, it was held that a railroad corporation may exempt itself from liability for the negligence of a connecting line, notwithstanding Rev. St. 1889, § 944, which provides that whenever any property is received by a railroad company for transfer from one place to another, within or without the state, or when the company issues rebates or bills of lading within the state, it shall be liable for any loss, damage, or injury to property because of its negligence or the negligence of any other common carrier, railroad, or transportation company to which said property may be delivered, or over whose line such property may pass. The court said: "If the section under discussion is to be construed literally; if it is to be interpreted as casting on one railway company the burden of the negligence of another railway company, against whose negligence the company sued has explicitly contracted, as in the present instance,—then I have no hesitation in saying I do not believe that the legislature has the power thus to interfere with the right of a railway company to contract, speaking in a general way, as it may deem fit. This power of individuals or corporations to contract as they think best has been recently decided by this court to be placed beyond legislative interference by constitutional guaranties, both state and federal, which uphold the right of 'due process of law,' and all that term implies. *State v. Loomis*, 115 Mo. 307. See, also, *in re Jacobs*, 98 N. Y. 98; *Butchers' Union Cases*, 111 U. S. 746, 6 Am. & Eng. Corp. Cas. 596; *in re Sam Kee*, 31 Fed. Rep. 680. The same ruling is applicable in this case. And it is equally beyond the power of the legislature, without fault on the part of the railway company complained of, and in spite of a contract to that effect to the contrary, to cast upon such company the burden of paying for losses incurred through the negligence of another and distinct corporation. Of course, as against its own negligence, a corporation would not be allowed to contract; for this would be subversive of public policy, and besides would be an abdication of the duties and functions as common carrier, which, by the very terms of its charter, it would not be allowed to abdicate or abrogate. But contracting against the negligence of another corporation rests upon a different footing altogether."

Limitation of Liability by Initial Carrier for Delay at Terminal Points—Duty of Carrier to Notify Connecting Carrier of Arrival of Stock—Pleading Notice.—In *Louisville, St. L. & T. R. Co. v. Bourne* (Ky., March 12, 1895), 29 S. W. Rep. 975, it was held that while a carrier of live stock may by contract limit its liability for delay at terminal points caused by the refusal or inability of a connecting carrier to receive and take charge of a shipment, yet it is the duty of such a carrier to promptly notify the connecting

line of the arrival of the stock, and that when the connecting road is operated by two companies it is the duty of the initial carrier, in an action by the shipper against it for injury to the stock, to show affirmatively by its pleading, when it relies on that fact as a defense, which company it notified.

Effect of stipulation Limiting Liability for Self-inflicted injuries by wild or Unruly Horses.—In *Illinois Central R. Co. v. Scruggs*, 69 Miss. 418, it was held that a stipulation in a contract for the shipment of horses, that for injuries arising “in consequence of any of them being wild, unruly, or weak, or of different ages or classes, or maiming each other or themselves,” was sufficient to release the carrier from liabilities for injuries sustained by the animals which clearly resulted from self-inflicted wounds.

Reasonableness of Stipulation Requiring Notice of, and Claim for Loss, as Condition Precedent to Right of Recovery.—In *Selby v. Wilmington & W. R. Co.* (N. Car., Oct. 17, 1893), 18 S. E. Rep. 88, it appeared that, by a stipulation in a contract for the transportation of live stock, the shipper agreed that in consideration of reduced rates granted “as a condition precedent to his right to recover any damage for loss or injury to said stock,” he would give notice in writing of his claim thereof to some officer of said company or its nearest station agent before said stock is removed from the place of destination * * * or from the place of delivery of the same, and before such stock is mingled with other stock,” and it was held that the stipulation was not unreasonable, nor in contravention of public policy. *Distinguishing Capehart v. Railroad Co.*, 81 N. Car. 438. *Citing Rice v. Railroad Co.*, 63 Mo. 314; *Goggin v. Railroad Co.*, 12 Kan. 416.

Reasonableness of Stipulation Requiring Commencement of Suit and Service of Summons within 40 Days.—In *Gulf, C. & S. F. R. Co. v. Hume* (Tex., June 14, 1894), 27 S W. Rep. 110, it was held that a statement in a contract for the shipment of live stock that suit thereon must be filed and service had of the citation before 40 days, was void as unreasonable, since the service of the citation must have been necessarily made by the clerk of the court, whose duties in issuing and serving the same were prescribed by law. The court said: “It was lawful for the defendant, by agreement with plaintiffs, to fix a reasonable time shorter than that allowed by law within which suit must be filed. *Railway Co. v. Trawick*, 80 Tex. 270. Forty days has been held to be reasonable, under the facts of the cases in which the question arose. The reasonableness of the time fixed is generally a question of fact, to be determined by the jury. The requirement that service of citation must be made within a given time rests upon a different ground. It is not a question whether or not the time agreed upon is reasonable, but is a subject about which the parties could contract? Upon the filing of a petition, it is the duty of the clerk to forthwith issue the citation, and the duty of the officer to whom it is delivered to serve it without delay. Rev. St. arts. 1213, 1218. When the plaintiff delivers his petition to the clerk, he has no further legal control over the action of the officers. The law secures to the plaintiff and defendant the benefit of vigilance in serving the citation. It is not an act to be performed by the plaintiff, or any one under his direction or control. We have found no case involving this question. The general rule, however, is settled by the authorities that an officer cannot contract to receive compensation for services in addition to those prescribed by law. Neither can he bind himself to accept less than the law allows him, nor to waive the remedy for collection provided by law. *Mechem*, Pub. Off. §§ 374, 376–378. This is placed upon the ground that, the compensation being prescribed by law, it is against public policy that it should be the subject of contract between the officer and litigants. The duties of public officers in issuing and serving citations are prescribed by law, and it would seem that for the same reason

any contract between third parties which would involve any interference with the regular discharge of those duties, or that would impose liability for a failure of an officer to discharge them with vigilance, would be equally against public policy and void. The part of the stipulation requiring service of citation to be made within 40 days was void. When one, for a legal and valuable consideration, agrees to perform two acts, which are severable, one of which is lawful and the other unlawful, the contract may be enforced as to that for which it was lawful to contract, and held void as to the other. But when the two things to be done are so blended that they cannot be separated, one lawful and the other not, the whole contract is void. *Ohio v. Board of Education*, 35 Ohio St. 519; *Gelpcke v. Dubuque*, 1 Wall. 221; *Presbury v. Fischer*, 18 Mo. 50; *U. S. v. Bradley*, 10 Pet. 343; *Hynds v. Hays*, 25 Ind. 31. One period of time is by this agreement designated within which two things are to be done. No part of that time can be specified as that within which suit might be filed, and the limitation of the right of recovery avoided, without performing the other act,—of serving citation. It is apparent, therefore, that these acts are so blended that they cannot be separated, and the entire clause is rendered nugatory by including that which it was not lawful to embrace in the agreement."

Waiver of Requirement of Notice of Loss and Claim for Damages.—In *Wabash R. Co. v. Brown*, 152 Ill. 484, it appeared that a contract for the shipment of live stock provided that no claim for damages should be allowed or paid by the carrier, nor suit thereon brought in any court by the shipper, unless a claim for such loss or damage should be made in writing, verified by affidavit, and delivered to the general freight agent of the carrier within five days from the time the stock shipped was removed from the car; that a shipper who had sustained a loss wrote a letter to the claim agent, who received it within the prescribed five days, but no affidavit was attached to such letter as required by the contract; that thereafter, in response to a letter of inquiry, the shipper received an answer from the agent to the effect that the claim had been left to the legal department of the company for an opinion as to the latter's liability; and it was held, in an action to recover for such loss, that the jury was justified in believing that the company received the claim without objection or pointing out its defects, and afterwards treated it as pending for adjustment upon its merits, and that consequently there was a waiver of further or other notice of claim for the alleged loss.

Duty of Carrier to Transport from Depot to Depot for Single Freight Charge and to Furnish Facilities for Loading and Unloading.—In *Union Trust Co. of New York v. Atchison, T. & S. F. R. Co. and Kenan v. Receiver of Atchison, T. & S. F. R. Co.* (U. S. Cir. Ct. N. D. Ill., Nov. 26, 1894), 64 Fed. Rep. 992, it was held that freight demanded by a carrier covers its entire service from depot to depot, and that such freight is, in law, compensation not only for the actual carriage, but also for the facilities furnished for loading and unloading. The court said: "The duty of the carrier is to furnish facilities for loading, carrying, and unloading. Its custody of the stock remains, and its obligation is not discharged until the shipper is furnished with proper facilities to unload. The carriage includes the delivery, and there can be no delivery, except at such a place as is suitable to the delivery of the particular thing carried. A delivery of live stock in the company's passenger station or freight platforms, unattended with suitable chutes, yards, etc., would be no delivery at all. It is the duty of the carrier, therefore, as said in the *Covington Stock Yards Case*, 139 U. S. 128, 11 Sup. Ct. 461, to furnish these facilities to the shipper.

"The freight demanded covers the entire service of the carrier from depot to depot. It is in law the compensation, not only for the actual carriage, but also for the facilities furnished for loading and unloading. The service

is a single one, and the compensation is likewise single. The law will not permit the charge for such single service to be divided. A carrier cannot make up its bill of charges in items—one for loading, one for carriage, one for personal service of attendants, one for delivery, etc. The freight is not an aggregate of separate charges, but a single charge. This policy of the law is not because a particular shipper might not deal with the carrier as intelligently in the case of one method as in the other, but because the public is not so likely to deal intelligently with a series of items as with a single freight rate. The shipper may be intelligent or unintelligent, ignorant or educated, accustomed to business or inexperienced in such affairs, deliberate and careful, or hasty and uninquiring. The service of the carrier is for one as well as the other. A single charge presents to him at once the whole problem. A series of charges might confuse him, and leave uncertain what, in the end, the aggregate would be. For illustration, many roads centreing in Chicago reach their passenger stations over other lines. Would it be tolerable to permit them to sell tickets from New York or Louisville to Chicago at a single rate, and then impose a further terminal charge at this end of the line? Would such practice be made less intolerable by the fact that the company actually carried the passenger on its own line within the corporate limits, thus fulfilling the letter of the contract; or by the fact that the additional terminal charge was posted, along with other rates, in the station of departure? The practical objection is that the public generally knows or ascertains the locality of the company's station within the city of destination, but in few instances consults the posted passenger rates. If the public did consult the posted rates, it would only be confused by any method other than that of a single rate, for travellers do not usually carry pencils and tabs, and the majority would be unable to figure out satisfactorily the results of tabulated statements. The law comes to their rescue by requiring the carrier to name, under a single and definite item, the cost of its entire undertaking, from station to station. It may be admitted that the reasons for a single charge in the case of freight traffic are not so cogent as in that of the carriage of passengers, but they are of the same character, and are calculated to safeguard the public against miscalculations and mistakes. Any other rule would expose those who are entitled to the service of the carrier to hardships and injustice that can easily be avoided, and open up opportunities to dishonest or tricky carriers that should not be tolerated.

"The duty of the defendant company, in this case, therefore, is to carry the live stock offered to it at Kansas City to its station of delivery in Chicago at a single charge, without the imposition of other charges, under any name or pretext. This does not exclude additional charges for services beyond the defendant's undertaking, or change the obligation of defendant with respect to goods or stock accepted for delivery at its Chicago station, when delivery is made, or offered to be made, at that station. It sometimes happens that a further service is required. The shipper may not wish his goods delivered at the station, but at some other point in the city, reached, perhaps, over another railroad's tracks, or by some other method of transportation. A terminal charge for this service is proper, both because it is not included in the carrier's undertaking, as held out to the public generally, and because such additional service to a special shipper, without charge, would be unfair to his competitors. In such cases the law permits, and the interstate commerce act expressly recognizes, the right of a terminal charge. The only limitations are that the additional charge be reasonable, and that the amount be announced in advance, so that the particular shipper wishing the additional service may be advised of the amount of his increased obligation."

Liability of Connecting Carrier for Delay in Transporting Live Stock—

Failure of Initial Carrier to Forward Way-bill.—In Louisville, N. A. & C. R. Co. v. Brinley (Ky., Feb. 6, 1895), 29 S. W. Rep. 305, which was an action to recover damages for delay in delivering live stock, it appeared that the cattle reached defendant's stock-yards by connecting line about five hours before the departure of a fast freight train; that defendant's servants refused to attach the car which contained the animals to the fast freight because the connecting line had not sent a way-bill, and although plaintiff exhibited to defendant's servants the bill of lading; that thereafter such servants made the car fast to a special train and attempted to overtake the fast freight, but without success, and the car was then attached to a slow-running freight train, which took the cattle to their destination at about noon of Tuesday, whereas, had they been taken by the fast freight they would have reached their destination the previous Sunday night; and it was held that defendant was liable for the damages sustained by the plaintiff because of the delay.

Duties and Liabilities of Railroad Companies as to Furnishing Cars for Transportation of Live Stock—Implication of Agreement to Furnish Cars by Request for Cars Made of Station Agent.—In Newport News & M. V. R. Co. v. Mercer (Ky., Jan. 23, 1895), 29 S. W. Rep. 301, it was held that as it is the duty of a carrier, independent of any statutory obligation, to provide reasonable facilities and appliances for transportation, when requested, the law implies an agreement to furnish necessary cars on a particular day, when a request has been in due time made by the shipper of a station agent, who, for that purpose, has the authority of a general agent.

Extent of Carrier's Obligations.—In Newport News & M. V. R. Co. v. Mercer (Ky., Jan. 23, 1895), 29 S. W. Rep. 301, it was held that a railroad company is not held to more than reasonable diligence and care in furnishing cars for the transportation of freight and that the wreck of a train, whereby free movement of cars is temporarily prevented, should be treated as a legal excuse for delay in having them at a particular time and place, in accordance with a special agreement.

Authority of Station Agent to Bind Company by Oral Agreement to Furnish Cars.—In Gulf, C. & S. F. R. Co. v. Hume (Tex., June 14, 1894), 27 S. W. Rep. 110, it was held that a station agent of a railway company can bind it by an oral contract to furnish cars at a given time for the shipment of freight, unless the shipper knows that the agent has no such authority. Citing Easton v. Dudley, 78 Tex. 236; McCarty v. Railroad Co., 79 Tex. 37.

Breach of Contract to Furnish Cars—Inability to Furnish Cars Because of Railroad Wreck as a Defense.—In Newport News & M. V. R. Co. v. Mercer (Ky., Jan. 23, 1895), 29 S. W. Rep. 301, which was an action to recover for failure to furnish cars as agreed between a shipper and the railroad company, the court instructed the jury that "it was the duty of the train despatcher to control defendant's cars and to assign them in the order in which they were called for by the shipper," but failed to give any explanation in connection therewith; and it was held that the instruction was erroneous as misleading, and that the instruction asked by defendant, to the effect that if the cars, at the time they were to have been delivered, were elsewhere upon the defendant's road, and that it was reasonably expected and arranged to bring other cars for plaintiff's use within the time required, but that it was unable to do so by reason of a wreck which occurred to one of its trains, they should find for defendant, should have been given.

Inability to Furnish Rolling Stock as Defense.—In Gulf, C. & S. F. R. Co. v. Hume (Tex., June 14, 1894), 27 S. W. Rep. 110, it was held that if the agent of a railroad company contracts to furnish cars at a given time for transportation of cattle, the fact that shipments of cattle over the line of the road at that time was so great that there were not sufficient rolling-

stock to enable the company to furnish the cars contracted for would not constitute a defense to an action for the breach of such contract.

Measure of Damages.—In *Newport News & M. V. R. Co. v. Mercer* (Ky., Jan. 23, 1895), 29 S. W. Rep. 301, which was an action to recover damages sustained by reason of the failure of a railroad company to provide cars for the shipment of cattle, as agreed on between the company and the shipper, the evidence was to the effect that there was no difference in the market value of the cattle at the place of destination on the day on which they were to arrive and the day on which they actually did arrive, and that there was no loss on that account; and it was held that the damages, if any, should be confined to the additional cost of feeding and caring for the cattle during the period of delay and the injury in weight and unfitness for market that may have resulted from such delay.

In *Gulf, C. & S. F. R. Co. v. Hume* (Tex., June 14, 1894), 27 S. W. Rep. 110, it was held that the measure of damages in an action brought to recover for breach of a contract to furnish cars for the transportation of cattle was the difference between the expense of caring for and feeding the cattle during the time they are kept waiting for cars and the amount it would have cost to handle them and provide food for the same time at the place of destination.

Negligent Transportation of Live Stock—Exposure to Danger of Fire.—In *Alabama & V. R. Co. v. Sparks*, 71 Miss. 757, it was held that a carrier is under a duty to transact its business in a reasonable and ordinary manner and that a course of business in which a shipper is required to place animals in a car, there to remain for 12 or 13 hours before the departure of a train having a fixed schedule time, is neither reasonable nor lawful.

Failure to Unload Car—Exposure of Animals to Inclement Weather.—In *Corbett v. Chicago, St. P., M. & O. R. Co.*, 86 Wis. 82, it was held that a railroad company was liable for damages sustained by a shipper of horses resulting from their exposure during the night to the inclemency of the weather, because of the company's failure to unload the car containing them on the evening of their arrival from a point a few miles distant as had been agreed between the shipper and defendant's freight agent. The court said: "The pretext that the defendant company, with all of its men, machinery, and vast railroad facilities at West Superior could not unload 16 valuable horses from a freight car on their arrival, and was compelled by invincible necessity to leave the car, with its perishable freight, in a distant, dangerous, and inaccessible place, exposed to wind and weather, at an inclement season of the year, through the whole night, was not sustained by any proof whatever, and it would require a large amount of the most reliable evidence to make it credible."

Liability of Railroad Company for Negligence of Former Receiver.—In *Texas & Pac. R. Co. v. Donovan*, 86 Tex. 378, it was held that the liability of the defendant company for damages sustained by negligence in the transportation of live stock while its road was in the hands of a receiver was not because of the receiver's negligence, but because the earnings of the road in his hands were used to make permanent and valuable improvements which enured to the benefit of the defendant.

Determination of Fact of Negligence—Province of Inferior Courts—Illinois Practice Act.—In *Wabash R. Co. v. Brown*, 152 Ill. 484, which was an action for the loss of cattle by the burning of the car which they occupied in the course of transportation, it was held that whether there was negligence on the part of the company in allowing the escape of sparks or brands from the engine, or whether there was negligence in placing a car of the kind in question within three cars of the engine, was a question of fact to be determined by the inferior and appellate courts under the 90th section of the Practice Act, which requires such determination and pro-

vides that no assignment of error in the supreme court shall call in question the determination of the appellate court upon controverted questions of fact.

Actions for Loss or Damages Sustained by Negligence—Transportation of Live Stock—Place of Service of Summons—Contract by Connecting Carrier Acting for Other Road.—In *Nashville, C. & St. L. R. Co. v. Carrico* (Ky., May 3, 1894), 26 S. W. Rep. 177, it was held that a contract made by a connecting railroad, acting as agent of another road, was within section 73 of the Civil Code, which provides that "an action against a common carrier, whether a corporation or not, upon a contract to carry property, must be brought in the county in which the defendant or either of several defendants resides, or in which the contract is made, or in which the carrier agrees to deliver the property," and that service of a summons may be made in the county where the contract was made by the connecting line.

Sufficiency of Answer—Denial of Sufficient Information to Form a Belief.—In *Nashville, C. & St. L. R. Co. v. Carrico* (Ky., May 3, 1894), 26 S. W. Rep. 177, which was an action for injuries to a shipment of mules, the declaration in substance alleged that the defendant company had agreed to transport the mules from one point to another, and that by the negligence of its agents operating the train on which the animals were placed they were greatly injured. The defendant simply stated that they did not have sufficient information to form a belief on the subject, and it was held that the statement was insufficient as a traverse under section 113 of the Civil Code, subsection 7, which permits a traverse for the want of information sufficient to form a belief, when facts alleged in the adverse pleading are not within the knowledge of the party making the traverse.

Competency of Witness to Prove Value of Stock at Destination.—In *Texas & P. R. Co. v. Donovan*, 86 Tex. 378, it was held that a witness in Texas who derived his information as to the market value of live stock at Chicago from trade journals and telegrams received from Chicago almost daily, was competent to testify as to the value of live stock at the latter place.

Instruction as to Carrier's Liability—Ignoring Stipulation Limiting Liability.—In *Illinois Cent. R. Co. v. Scruggs*, 69 Miss. 418, which was an action to recover for injuries to horses, it was held that an instruction which ignored a stipulation in the contract of transportation which limited the liability of the carrier, and instructed the jury that nothing would relieve the carrier from his obligation to carry and deliver safely except the act of God, the public enemy, or the act or conduct of the owner, was error.

Proof of Damages—Objections to Proof Raised for First Time on Appeal.—In *Alabama & V. R. Co. v. Sparks*, 71 Miss. 757, it was held that an objection that the proof of the value of animals for the injury to which the suit was brought did not relate to their value at the point from which they were shipped, which value under the contract was to control in case of injury, could not be raised for the first time on appeal.

GRIMES

v.

EDDY *et al.**(Missouri Supreme Court, December 4, 1894.)*

Judicial Notice as to Texas Fever.—Courts will take judicial notice that Texas cattle have some dangerous or infectious disease communicable to native cattle. *Overruling* Bradford v. Floyd, 80 Mo. 207.

Liability of Railroad Company for Allowing Texas Cattle to Escape from Wreck of Train.—The escape from a railroad wreck of cattle infected with Texas fever because of the negligence of the railroad employes is sufficient, under sections 953, 954 of the Revised Statutes respecting the transportation of such cattle and imposing a liability on companies transporting the same for loss occasioned by the infection of native cattle, to render the company liable for the loss of domestic cattle which contracted the disease by passing over the tracks of the escaped cattle.

Province of Jury as to Negligence of Railroad Employes in Allowing Escape of Texas Cattle from Wreck.—The question as to whether or not the cattle were permitted to escape from the wreck by reason of the carelessness or negligence of the railroad employes, is for the jury.

Validity of Statute Prohibiting Transportation of Texas Cattle—Interference with Interstate Commerce.—Section 953 of the Revised Statutes, which prohibits railroad companies from bringing into or transporting through the state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease whatsoever, is, in so far as it prohibits the transportation of such cattle through the state, an attempted regulation of interstate commerce, and as such invalid, since, as all such cattle, though not diseased themselves, have the means, power, or quality, by reason of their nativity and their usual and normal condition to communicate disease to native cattle, the inhibition would extend to all cattle within the territory prescribed.

What Cattle are Comprehended by the Statute.—The statute is broad enough to embrace cattle infected with microbes or parasites by which Texas fever is communicated to domestic cattle, although such infected cattle are themselves free from disease.

APPEAL from Monroe county circuit court.

Jackson & Montgomery, for appellants.

R. N. Bodine and Stocking & Alexander, for respondent.

BURGESS, J.—This is an action to recover the value of a cow alleged to have died from Texas fever, contracted from cattle shipped over the Missouri, Kansas & Texas Railway while the same was being operated by the defendants, as receivers. Case stated.

The suit was commenced before a justice of the peace in Monroe county, and appealed to the circuit court.

The statement is in two counts, and, leaving off the caption, is as follows: "Plaintiff says that the Missouri, Kansas & Texas Railway Company was on and after the day, hereinafter mentioned, and now is, a railroad corporation organized under the laws of the state of Kansas, and that, at the time hereinafter mentioned, defendants, George A. Eddy and H. C. Cross, were, and now are, receivers of the said Missouri, Kansas & Texas Railway Company, appointed by the United States circuit court for the Eighth judicial circuit, and, as such receivers, were at said date, and now are, in possession of the railroad of said corporation, known as the Missouri, Kansas & Texas Railroad, running through the county of Monroe, in the state of Missouri, and, as said receivers, engaged in running and operating the same, and doing a general railroad business over and on said railroad.

"Plaintiff states that on or about the — day of May, 1890, defendants, as such receivers, were engaged in transporting upon said railroad, and had upon their cars, while so transporting through Monroe county, Missouri, a large number of Texas cattle, said cattle, being at said time infected with a deadly disease, known as 'Texas fever;' that all Texas cattle, during the spring and summer months, whether perceptibly affected by said disease or not, communicate the same to all cattle raised in Missouri passing over land previously passed over by such Texas cattle; that defendants at said time well knew that said cattle were Texas cattle, that they were infected with said disease, and of the liability aforesaid to communicate such disease to Missouri-raised cattle, by leaving the germs of said disease upon the ground over which they travelled; and that defendants, as such receivers, so knowing, and while said Texas cattle were by them being transported across Monroe county, Missouri, wrongfully and negligently, by their servants and employes, permitted said Texas cattle, so infected with said disease, and so liable to communicate said disease as aforesaid, whether apparently affected themselves or not, to escape from the control and custody of said defendants, and run at large over a large area of land in Monroe county, Missouri, including public highways, for a space of twelve hours or more; and that, plaintiff then and there being the owner of a certain Missouri-raised cow, of the value of one hundred and twenty-five dollars, the same, without any fault or negligence of plaintiff, passed over the ground over which said Texas cattle had passed as aforesaid, and thereby the said disease of Texas fever was communicated to plaintiff's cow, whereby she sickened and died, so that she was

wholly lost to plaintiff, whereby he was damaged in the sum of one hundred and twenty-five dollars, for which he asks judgment.

"Plaintiff, for another cause of action against defendants, as receivers, ss aforesaid, states that the Missouri, Kansas & Texas Railway Company was on and after the days hereinafter mentioned, and now is, a railroad corporation organized under the laws of the state of Kansas, and, at the time hereinafter mentioned, defendants were, and now are, the receivers of the said Missouri, Kansas & Texas Railway Company, appointed by the United States circuit court for the Eighth judicial circuit, and, as such receivers, were at said dates, and now are, in possession of the railroad of said corporation known as the 'Missouri, Kansas & Texas Railroad,' running through the county of Monroe, in the state of Missouri, and, as such receivers, engaged in running and operating the same, and doing a general railroad business over and on said railroad.

"Plaintiff states that on or about the — day of May, 1890, defendants, as such receivers, were engaged in transporting upon said railroad, and had upon their cars while so transporting, through Monroe county, Missouri, a large number of Texas cattle, at said time being affected with the disease known as 'Texas fever;' that defendant at said time well knew that said cattle were Texas cattle, and were affected with Texas fever; that said cattle, while being so transported by defendants, were permitted by defendants to escape from the cars in said Monroe county, and to run at large over a large area of land in said county along the route and in the vicinity of said railroad, including public highways, for the space of twelve hours or more; and that, plaintiff then and there being the owner of a certain native Missouri-raised cow, of the value of one hundred and twenty-five dollars, the same, without any fault or negligence on the part of the plaintiff, passed over the ground over which said Texas cattle had passed as aforesaid, and thereby the said disease of Texas fever was communicated to plaintiff's said cow, whereby she sickened and died, so that she was wholly lost to plaintiff, whereby he was damaged in the sum of one hundred and twenty-five dollars; wherefore plaintiff says that under the provisions of sections 953 and 954, Rev. St. Mo. 1889, he is entitled to recover from defendants the sum of one hundred and twenty-five dollars, for which he asks judgment."

To the statement, defendants filed an answer, denying all the allegations contained therein.

A separate trial was had on each count, resulting in a verdict and judgment for plaintiff on both counts.

It was by stipulation admitted that the cattle, which it is claimed caused the injury, were shipped from Sinton, in San Patricio county, Tex., over a line of railroad connecting with that operated by the defendants at West Point, Tex., and then delivered to the defendants, consigned in Chicago, Ill. Said cattle were shipped May, 16, 1890, and reached Paris, Monroe county, on the morning of May 21, 1890, while en route to Chicago. As the cars going eastward towards the depot passed over the switch, they were wrecked. The engine and several cars loaded with coal went over the switch safely, but the rear trucks of one coal car, and the cars in which these cattle were loaded, were thrown from the track, and the balance of the train remained standing on the track in a westerly direction from the wreck. One of the cattle cars was broken in at one end, and some of the cattle escaped in this way. The cars were thrown over to one side, and the cattle all thrown together at one end, and it became necessary to remove them speedily to prevent them smothering. This was done by opening the side doors, pulling them out with ropes, etc.

The town of Paris lies nearly wholly south of the railway, and there is no street across the railway track west of where the wreck occurred. The depot and stock-yard are east of the place of the wreck, the stock-yard on the north side of the track. At the place of the wreck the right of way on the north side abuts upon enclosed land; and just east of the wreck, and opposite where the forward part of the train stood, is located a section-house and tool-house. The right of way opposite the wreck was also enclosed ground. The wrecked cars were thrown towards the south, a coal-car striking a telegraph pole, and bearing it down upon the wire fence close to where it stood. The train in the rear of the wreck stood on the track, reaching back the length of some 15 or 16 cars to a trestle or fill; so that between the wreck and the fill there was no way to pass from the south side of the track to the north side, because of the cars in the train standing on the main track. A short distance west of the wreck, and south of the railway, is a little open piece of ground, through which a road runs from its connection with the regularly laid out streets of the town to a road-crossing across the railway, through a gate, into private grounds lying north of the track. The cars of the train not wrecked stood across this crossing.

As the cattle escaped from, or were removed from, the wrecked cars, they were scattered along the right of way south of the track, and between the wreck and the road-crossing west of the wreck about 150 feet.

Plaintiff's evidence showed no efforts of any one, save the

trainmen and railroad employés, to stop the cattle from wandering off. They did nothing with the cattle that night, as they were wild, vicious, and unmanageable. By daylight the next morning, the cattle had wandered out over the streets of Paris, and upon open grounds, some going as far as a mile in the country; and it was 10 o'clock A.M. before they were all driven into the railroad stock-pens by horsemen.

The testimony showed that all Texas cattle contain in their system a parasite or germ which is harmless to them; that it simply acts upon their system as vaccine does upon a human being inoculating them, and rendering them free from all danger from the disease; that they are not diseased themselves, but, on the contrary, are inoculated against the disease, and do not die from it unless they are brought to a colder climate, and get rid of the parasite, and are then again subject to the disease, in which event it is as fatal to them as it is to native cattle. There was no indication of any disease in the Texas cattle that escaped at Paris. The evidence also showed that native cattle walking over the same ground where the Texas cattle had been, or eating from the same hay, or drinking from the same pool of water, would contract the Texas fever; and that over 20 head belonging to different persons in Paris, and which had thus been exposed to the disease, did, in a few days thereafter, contract and die from the Texas fever, and among the rest the cow of plaintiff.

The evidence on the part of the defendants showed that, at the time of the wreck, the train was running at the rate of 8 to 10 miles per hour; that the engine and three or four cars passed over the switch safely, but that the rear trucks of a coal-car went on the switch-track, and the forward trucks on the main line, and the wreck resulted. An examination of the switch revealed the fact that the rod connecting the switch with the target and shaft had been detached. The pin which held the goose-neck with which the connection had been made had been removed and carried or thrown away, and the connection made by the goose-neck broken. The result was that the moving cars passing over the track at the switch misplaced or opened the switch, and the forward trucks, passing over in safety, remained on the main track, but the rear trucks of the same car were, by reason of the moving of the switch, sent on the switch-track. The stone used in separating the connection was found, and the marks on it and the iron connection were plainly seen. Similar wrecks and attempts at wrecks had been made on the line of defendants' railway during the same season and in the same location. As soon as they could do so, defendants had the cattle collected, and placed in the stock-pens of the railroad company.

At the close of plaintiff's evidence, defendants interposed a demurrer thereto, which was overruled. Under the instructions of the court, there was a verdict for plaintiff on each count in the complaint.

Defendants then filed a motion for a new trial and in arrest of the judgment, which being overruled, they appealed to this court.

The first contention of defendants is that the demurrer to the evidence under the first count in the statement should have been sustained, for the reason that it failed to support the averments in the statement, in that it failed to show that the Texas cattle were permitted to escape, were infected with a dangerous or deadly disease, and that the defendant knew it; and that they negligently permitted the cattle to escape from their custody or control.

The cause of action stated in the count now under consideration being one at common law, before the plaintiff was entitled to recover thereunder, it devolved upon him to show, not only that the Texas cattle were infected with a dangerous and deadly disease, microbe, or parasite, and that the disease was communicated to his cow, by reason of which she died, but it devolved upon him to show that defendants knew, or that it was a notorious fact, that all Texas cattle were so diseased or so infected, and that it was by their negligence, or that of their employés, that they were permitted to escape from their custody or control.

While the proof did not show that the cattle were themselves in fact diseased, it is of general notoriety that all cattle in that part of Texas from which these cattle were shipped are infected with a microbe or germ of disease which is taken in by Missouri cattle by injection; that is, taken into the system through the stomach, by eating grass over which Texas cattle have travelled, or by drinking water from pools or streams through which they have passed, and deposited the germs by droppings or from ticks.

Plaintiff undertook to fix notice on defendants of the infection of the cattle by proof of notoriety of the fact that all Texas cattle are affected with what is called "Texas fever," and will impart that fever to native cattle under certain conditions. In respect of animals of a wild nature, such as beasts of prey or animals by nature vicious, the owner is responsible for any damages occasioned by them, whether or not he knew of its habits or disease. *Canefox v. Crenshaw*, 24 Mo. 199. While, at common law, it was the duty of every man to restrain his cattle within his own inclosure, and for failing to do so he was liable for their trespasses and for injuries resulting from disease communicated by them,

whether he voluntarily permitted them to go at large or not (Cooley, Torts, 397), as to domestic animals the common law does not fix any liability on the owner for damages done by them at large on the ground of negligence, without it be proven that the owner knew that the animals were mischievous or dangerous (Lyke v. Van Leuven, 4 Denio, 127; Cooley, Torts, 341, 343; Dearth v. Baker, 22 Wis. 73; Vrooman v. Lawyer, 13 Johns. 339; Railway Co. v. Finley, 38 Kan. 550; Patee v. Adams, 37 Kan. 133.)

In Bradford v. Floyd, 80 Mo. 207, which was an action for damages occasioned to plaintiff's cattle by contact with what were known as "Texas cattle," it was held that, while the evidence showed that the defendant knew that they were Texas cattle, before defendant could be held liable for damages caused by disease communicated by them to plaintiff's cattle, it must be shown that defendant knew that his cattle were diseased. The same rule was announced in Railway Co. v. Finley, 38 Kan. 550, 16 Pac. 951, and Patee v. Adams, 37 Kan. 133.

Judicial notice
as to Texas
fever.

Since those cases were decided, scientific investigation has demonstrated, and it is now a matter of general information or knowledge, that Texas cattle are not in fact diseased themselves, so as to render them unhealthy for food, but that all Texas cattle are infected in their systems with a parasite or germ, which is harmless to them, but which, when taken into the stomach by native cattle, produce what is known as "Texas fever."

In Kimmish v. Ball, 129 U. S. 217, it was said: "That cattle coming from those sections of the country during the spring and summer are often infected with a contagious and dangerous fever is a notorious fact." If, then, it be a notorious fact, courts will take judicial notice thereof, and no proof is required. So it is said that "courts will, in general, take notice of whatever ought to be generally known within the limits of their jurisdiction." Greenl. Ev. § 6. "If a fact alleged to exist, and upon which the rights of parties depend, is within common experience and knowledge, it is one of which the courts will take judicial notice." Minnesota v. Barber, 136 U. S. 313, 32 Am. & Eng. Corp. Cas. 405; Brown v. Piper, 91 U. S. 37-42; Phillips v. City of Detroit, 111 U. S. 604, 606.

Whatever difference of opinion may have at one time existed as to the cause and character of what is known as "Texas fever," and the manner in which it is communicated to native cattle of the state, yet the fact is of common knowledge that the disease is imparted under certain conditions by Texas cattle. This peculiar characteristic and its notoriety

are recognized by this and many other states, as is shown by the various legislation with respect thereto, as well as by regulations in the markets of the country, which require this class of cattle to be kept separate from others. From these considerations it would seem that the case of *Bradford v. Floyd, supra*, in so far as it holds that courts will not take judicial notice of the fact that Texas cattle have some contagious or infectious disease, communicative to native cattle, should be overruled.

Plaintiff was permitted to prove, over the objections of defendants, that it was a matter of universal knowledge that Texas cattle were infected with an infectious disease, communicable to native cattle; and while, from what had been said, such proof was entirely unnecessary, it is impossible to see how defendants could have been prejudiced thereby.

As the railway company owed no duty to the plaintiff, what produced or caused the wrecking of the train was of no consequence, except for the purpose of showing how the cattle

Liability of defendant. escaped from the custody of defendants or their employés, the inquiry being whether the escape was because of their carelessness or negligence.

If so, as it was a notorious fact that the cattle were infected with microbe or parasites, which they were liable to communicate to domestic cattle travelling over the ground after them, or from eating grass over which they had passed or their droppings had fallen, the Texas fever, and the plaintiff's cow had contracted the disease in that way, from which she died, the plaintiff is entitled to recover.

As to whether or not the cattle were permitted to escape from the custody of defendants' employés after the wreck, by reason of their carelessness or negligence, was one to be

Province of jury—Escape of cattle. passed upon by the jury, under proper instructions from the court; and we are not prepared to say that there was not sufficient evidence upon which to predicate such instructions. The instructions

that were given under this count in the complaint presented the law of the case very fairly to the jury.

The second count of the statement is predicated upon sections 953 and 954, Rev. St. 1889. They read as follows: "Sec. 953. Every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his own premises or the land to which they belong; and no person shall drive any diseased or distempered cattle affected with what is commonly known as Texas or Spanish fever, or any other infectious disease, into or through this state, or from one place therein to another, unless it be to remove them from one piece of ground of the

same owner ; and no railroad company or owner of a steamboat, or any other company or person, shall bring into or transport through this state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease, epidemic, or pestilence. * * *

Sec. 954. Any person or persons, railroad company, or owner or owners of any steamboat, who shall offend against or violate any of the provisions of the next preceding section shall be liable for all damages sustained on account of such Texas or Spanish fever, or other infectious disease, being communicated from any of such diseased animals or cattle to any other animal or cattle in the neighborhood or along the line of such transportation, or removal of such diseased animal or cattle into or through this state, or from one part thereof to another ; and the existence or presence of such Texas or Spanish fever, or other contagious or infectious disease, among the native cattle of this state, on the same range with or in the vicinity of any such Texas, Mexican, Cherokee, or Indian cattle, or along the line or route over which they were removed or transported, shall be *prima-facie* evidence that the same were affected with such disease at the time of being so removed or transported, and communicated it to such native cattle so affected therewith."

It is claimed by defendants that the statute is unconstitutional and void, as being an attempt to regulate commerce between the states ; that the clause in the statute making the existence of Texas or Spanish fever or other contagious or infectious diseases among the native cattle along the line of railways by which Texas cattle may be transported *prima-facie* evidence that the cattle being so transported were diseased includes a condition or affection which is the normal or natural state of all Texas, Mexican, Cherokee, or Indian cattle, and that, as the evidence shows, all such cattle are alike affected ; that they all have the parasite in their system which communicates a disease called "Texas fever" to native cattle, and, if the language of the statute is broad enough to cover such a construction, then it is a regulation of commerce, under the decision in *Railroad Co. v. Husen*, 95 U. S. 465.

It was held in that case that a statute which prohibited driving or conveying any Texas, Mexican, or Indian cattle into this state between the 1st day of March and the 1st day of November in each year was in conflict with the clause of the constitution that provides that congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes. But in the same

opinion the right of a state to pass laws to prevent animals suffering from contagious or infectious diseases from being brought into the state, and to exclude them therefrom, is recognized. The court says: "It may also be admitted that the police power of a state justifies the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons affected by contagious or infectious diseases—a right founded, as intimated in the Passenger Cases, 7 How. 283, by Mr. Justice GREER, in the sacred law of self-defense. *Vide* Tomlinson v. Hewett, 2 Sawy. 283, Fed. Cas. No. 14,087. The same principle, it may also be conceded, would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having contagious or infectious diseases. All these exertions of power are in immediate connection with the protection of persons and property against noxious acts of other persons, or such a use of property as is injurious to the property of others. They are self-defensive." See, also, *Minnesota v. Barber*, 136 U. S. 313, 32 Am. & Eng. Corp. Cas. 405; *Kimmish v. Ball*, 129 U. S. 217.

In the case last cited, the court, in speaking of the *Husen Case*, says: "The decision in that case rested upon the ground that no discrimination was made by the law of Missouri, in the transportation forbidden, between sound cattle and diseased cattle; and this circumstance is strongly put forth in the opinion." Since the decision in the *Husen Case* the statute has been amended, and section 953 provides "that every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they do not go at large off his own premises or the land to which they belong, and no person shall drive any diseased or distempered cattle affected with what is commonly known as Texas or Spanish fever, or any other infectious disease, into or through this state, or from one place therein to another, unless it be to remove them from one piece of ground to another of the same owner, and no railroad company or owner of a steamboat, or any other company or person, shall bring into or transport through the state, or from one part thereof to another, any Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly known as Texas or Spanish fever, or any other contagious disease, epidemic, or pestilence."

In *Gilman v. Philadelphia*, 3 Wall. 713, it was held that, "under quarantine laws, a vessel registered or enrolled and licensed may be stopped before entering her port of destina-

tion, and a bale of goods, upon which the duties have or have not been paid, laden with infection, may be seized under the health laws, and, if it cannot be purged of its poison, may be committed to the flames." The purpose of the statute is not to interfere with the commerce between the states, but is to exclude from the state, and to prohibit the importation thereto, of cattle having contagious or infectious diseases, and therefore exclusively for the protection of the property of the citizens of this state against the acts of such persons as use their property in such a way as is dangerous and detrimental to the interest of others. In speaking of the Kansas statute enacted for the same purpose, in *Railway Co. v. Finley*, *supra*, it is said: "If this law is not constitutional and within the police power of the state, then the state is absolutely powerless to protect the property of its citizens. If this and similar statutes are in conflict with the constitution of the United States, the state is wholly disarmed and defenseless to exclude property from the state that is dangerous and injurious to the property of its citizens."

But it is argued that as all Texas cattle, though not diseased themselves, have the means, power, or quality, by reason of their nativity and their usual and normal condition, to communicate disease to native cattle, then it must include all cattle coming from the south, and amounts to an absolute inhibition of their shipment into or through this state.

Grant it that such is the effect, yet it seems clear that, if they are diseased or infected with a parasite which they communicate to and which destroys native cattle, the state has the same right, as a police regulation for the protection of the property of her citizens, to prohibit their importation into the state it as would have to prohibit the importation of persons affected or infected with some contagious and deadly disease.

A part of a statute may be unconstitutional, and another part valid, even though the incongruous provisions be contained in the same section; or it may be unconstitutional with respect to its effect upon certain subjects or things embraced within its scope and application, and constitutional as to others. If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being enforced according to the legislative intent, independent of that which is rejected, to the extent of the conflict and repugnancy it may not be enforced, while it is otherwise as to the provisions not repugnant to the constitution.

Thus, that part of the statute which prohibits any railroad company or owner of a steamboat or any other company or person from bringing into this state, for the purpose of transportation through the same, any of the diseased cattle of the

kind and character mentioned in the act, may be held unconstitutional, and that part which prohibits the bringing into the state, or the driving on foot of such cattle from one part of it to another, may be upheld as a police regulation. Shipping such cattle by railroad or steamboat is attended with but little, if any, danger, as it is only when they come in contact with the ground with their feet, or by their droppings on the ground, that they are capable of imparting the fever to native cattle. While the state has no power to prohibit the transportation of articles of commerce through it by common carriers, railroads, and steamboats, it has the right to restrict the manner and mode of taking animals infected with parasites, by which they communicate disease to native cattle, and to confine that mode to railroads and steamboats, if necessary, in order to prevent the spread of disease and contagion, which results in the destruction of the property of her citizens. "To the extent of the collision and repugnancy, the law of the state must yield; and to that extent, and no further, it is rendered by such repugnancy inoperative and void." *Com. v. Kimball*, 24 Pick. 359.

It was held in *Donnersberger v. Prendergast*, 128 Ill. 229, that "because a portion of a statute is unconstitutional it does not follow that a court may declare its other provisions void, if they are separable; and the valid portions are capable of enforcement independently of such provisions, unless it shall appear that all of the provisions of the act so depend on each other, operating together for the same purpose, or are otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other." "A legislative act may be entirely valid as to some classes of cases and clearly void as to others." *Cooley*, Const. Lim. 213. Thus it has been held that the law prohibiting the sale of liquors may be void as to imported liquors and valid as to all other. *State v. Amery*, 12 R. I. 64; *Tiernan v. Rinker*, 102 U. S. 123.

The power to prevent the importation of diseased or infected cattle into the state, and the power to prevent the transportation of such cattle through the state over the great thoroughfares—railroads—or by river, rests upon very different principles. The one, as has been seen, may be regulated or prohibited by the state, in the exercise of its police power; while the other is a plain regulation of interstate commerce—a regulation extending to prohibition. Cattle thus transported are articles of commerce, and, whatever may be the power of the state over commerce that is altogether confined within its borders, it cannot prohibit or regulate that which is interstate. Texas

Interference
with interstate
commerce.

cattle, as a general thing, while having that peculiarity, not possessed by native cattle, of transmitting or communicating to them, through a microbe or parasite carried in their bodies, the Texas fever, are wholesome food, and extensively used for that purpose, and are to be found for sale as beef in many of the markets of the different states.

The burdens imposed upon railroads for transporting them through the state are onerous, because of their liability to escape from the cars, and in that way and otherwise communicate disease to native cattle; and, to prevent such occurrence, the state, as a police regulation, would clearly have the right to prescribe the kind of cars in which they shall be transported, and such precautionary measures as may be reasonably necessary for that purpose. The transportation of property from one state to another is clearly a branch of interstate commerce, and the statute is unquestionably a plain interference with such transportation; in fact, an absolute inhibition against it.

The effect of the statute is to obstruct interstate commerce, and to discriminate between the property of one state and that of citizens of other states, and in so far as it prohibits the transportation of Texas, Mexican, Cherokee, and Indian cattle through the state, by railroads and steamboats, conflicts with that provision of the constitution that provides that "congress shall have the power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Leisy v. Hardin*, 135 U. S. 132; *Minnesota v. Barber*, 136 U. S. 313, 32 Am. & Eng. Corp. Cas. 405; *Crutcher v. Com.*, 141 U. S. 47.

The first clause of section 953, which provides that "every person shall so restrain his diseased or distempered cattle, or such as are under his care, that they may not go at large off his premises, or the land to which they belong," has no application whatever to a case like the one in hand. It is evident from a casual reading of it that it only has application to cattle that are kept or herded upon some particular tract of land or premises. The mischief intended to be prevented by the act was the importation into this state of Texas, Mexican, Cherokee, and Indian cattle, by which a disease, commonly called and known as "Texas fever," is communicated to domestic cattle; and although the statute mentioned cattle affected or infected with Texas or Spanish fever, the evident intention of the legislature was to include such cattle as were infected with microbe or parasite by which said fever is communicated.

The act is entitled, "An act to amend section 4358, of article two, of chapter eighty-seven, of the Revised Statutes of Mis-

souri, entitled 'Of the Restraint of Diseased and Texas Cattle.' " Mr. Kent, in his commentaries (volume 1, p. 461), says: "In the exposition of a statute, the intention of the lawmakers will prevail over the literal sense of the terms; and its reason and intention will prevail over the strict letter. When the words are explicit, the intention is to be collected from the context; from the occasion and necessity of the law; from the mischief felt and the remedy in view; and the intention is to be taken or presumed according to what is consonant with reason and good discretion."

Scope of
statute.

We must therefore hold that the statute is broad enough, when the object of the legislature is taken into consideration, to embrace cattle infected with microbes or parasites by which Texas fever is communicated to domestic cattle.

The judgment as to the first count is affirmed.

As to the second count, the judgment is reversed.

All concur.

BARCLAY, J., concurs in the result.

Negligence of Carrier of Live Stock.—See *Adams Express Co. v. Jackson* (Tenn.), 55 Am. & Eng. R. Cas. 319, and note 323.

Liability of Railroad Company for Death of Cattle by Infection from Texas Cattle Allowed to Escape from Wrecked Train—Contributory Negligence of Person Damaged, in Enticing Cattle and Allowing them to Mingle with his own Cattle.—In *St. Louis, I. M. & S. R. Co. v. Goolsby*, 58 Ark. 401, it was held that one who sues a railroad company for negligence in allowing cattle infected with Texas fever to escape from a wrecked train, whereby his cattle became infected and died, is not entitled to recover without proof that the company knew, or should have known, that the cattle which it allowed to escape from the wreck were infected. In this case the only evidence to show that the company knew that the cattle were infected, was its knowledge that they came from Texas, and that Texas was infected territory, and it was held that plaintiff could not recover if he was aware of that fact, yet supplied the infected cattle with food, allowed them to enter his enclosure and mingle with his own cattle, and retained them in the hope of a reward instead of notifying the company. The court said: "*Scienter* was averred and denied. Hence, the onus was upon appellee to show that appellant knew or had notice of such facts as would make it chargeable with knowledge that the cattle were infected, and liable to communicate the disease. No actual knowledge of the infected condition of the cattle is brought home to the company. But appellee contends that it being shown that these were Texas cattle, and that Texas is infected territory, these facts were sufficient to charge appellant with knowledge that the cattle being transported by it on this occasion were infected, and of a kind to communicate their infection to other cattle upon the range where they escaped. In its last instruction the court told the jury that if plaintiff (appellee) 'knew or had notice that such stray cattle were from the wrecked train, and that they were Texas cattle, and from a district infected with Texas fever, and liable to communicate disease, and that with this knowledge he negligently permitted such cattle to frequent the pen in which his own cattle stayed, and this contributed in

any respect to his own injury, you will find for the defendant, for the reason that when the wrong of both parties contributed to the injury the law declines to apportion the damages, and leaves the injured party without compensation.' If the theory contended for by counsel be correct (which it is unnecessary to decide), the same rule which charges the railroad company with knowledge charges appellee with knowledge; and the above instruction, when applied to the facts, makes the verdict of the jury clearly erroneous, for the case which appellee has made for himself, by his own evidence, is just this: He knew these were Texas cattle. He knew Texas was infected territory. He had been forewarned of the great danger from Texas fever, for 'he had seen lots of it; had seen cattle dying and dead all over the prairies' in Texas. Yet, knowing the dread consequences of this pestilential fever, it appears that he provoked two of the train-wrecked and bruised brutes, with luscious provender, to take up at his lot, and permitted them to consociate with his own herd, until they inoculated the whole range round about the mill with the deadly germ from their droppings. With the knowledge he had of Texas fever, and the knowledge he ought to have had (applying to him the same rule his counsel would have us apply to the railroad) of infected animals, ordinary prudence, even the slightest consideration for the safety of his own cattle, would have suggested the urgent necessity, upon the first discovery of these infected cattle with his own, of isolating them, or driving them to the nearest station, a short distance away, or else to have immediately notified the railroad officials, who, it appears, were anxious to have information concerning them. Instead of doing this, he waited for the reward. If the learned counsel be correct in his theory with reference to the appellant being charged with knowledge of the infection, his client, being also charged with such knowledge, has certainly contributed to his own hurt. If this theory be not correct, and he depends upon the actual knowledge of the company, without any knowledge of his own, as he alleges in the complaint, then is the verdict entirely without evidence to support it."

GULF, COLORADO & SANTA FE R. CO.

v.

ELLIS.

(*Texas Supreme Court, May 10, 1894.*)

Constitutionality of Act of April 5, 1889, Allowing Recovery of an Attorney's Fee in Addition to the Recovery for the Stock Killed.—The act of April 5, 1889, providing that any person having a claim for stock killed or injured by the train of any railroad company not exceeding \$50, may, in addition to the recovery of the claim against the company, recover a reasonable attorney's fee, not exceeding \$10, to be assessed by the court or jury, is not violative of the 14th amendment to the constitution of the United States, because denying equal protection of the laws, nor is it violative of the provisions contained in art. 1 of the state constitution declaring (in section 2) that the political power inheres in the people, and pledging the preservation of a republican form of government and providing (in

§ 3) that no man or set of men are entitled to exclusive public emoluments except in consideration of public services according, in § 13, remedies to every person by due process of law ; and inhibiting, in § 19, deprivation of property except by due course of the law of the land, nor is it a special law regulating the practice of the courts within the prohibition of art. 8, § 56.

ERROR to court of civil appeals, 3d judicial district.
J. W. Terry, for plaintiff in error.

BROWN, J.—This is a suit instituted by the appellee, W. H. Ellis, by next friend, H. W. Ellis, against the appellant, in the justice court of precinct No. 1, Lampasas county, Tex., wherein, by an amended account, filed Oct. 9, 1890, *Case stated.* the plaintiff charges, in substance, that on or about the 12th day of August, 1890, the appellant, by its engines and cars, killed a certain colt, the property of the appellee, of the value of \$50.

He further charges that he presented his claim, verified by affidavit, to the defendant's station-master nearest the place where the colt was killed, according to the provisions of the act of 1889, and that the amount was not paid at the expiration of 30 days after the presentation of the claim ; wherefore plaintiff claims \$10 additional as attorney's fees, as provided by said act of the legislature.

The appellant filed an answer, by which it, in substance, admitted the allegations in plaintiff's account, but denied that it was liable for attorney's fees, and moved the court to strike out plaintiff's claim for the same.

There was a judgment in the justice court for the sum of \$50, with interest and attorney's fees, from which appellant prosecuted an appeal to the district court of Lampasas county.

At the November term of the district court the same judgment was rendered in favor of the appellee, from which judgment the appellant prosecuted the appeal to this court.

The defendant, in open court, excepted to so much of the judgment as allowed \$10 attorney's fees, and in open court gave notice of appeal to the supreme court of the state of Texas. The judgment of the district court was affirmed by the court of civil appeals, from which this writ of error is prosecuted.

Plaintiff in error presents to this court the single question of the validity of the following act of the legislature, approved April 5, 1889 :

"An act to regulate the presentation and collection of personal services or labor, or for damages, or for overcharge on

freight against railway corporations doing business in this state in cases where the amount claimed does not exceed \$50 and to fix the measure of damages recoverable in certain of such cases. Section 1. Be it enacted by the legislature of the state of Texas: That after the time that this act shall take effect any person in this state having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station-agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court, and if he shall finally establish his claim and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue."

Act April 5,
1889.

This act is assailed as being in violation of the first section of the fourteenth amendment to the constitution of the United States, because it denies to the railroad companies the equal protection of the laws, and because it is in conflict with article 1, §§ 2, 3, 13, and 19, and article 3, § 56, of our state constitution. Constitution-
ality of act.

Except that which is predicated upon section 2, art. 1, of our state constitution, all the objections were presented in the case of *Insurance Co. v. Chowning* (decided by this court to-day), 26 S. W. 982, and the propositions were all decided against the contention of plaintiff in error.

In enacting this law the legislature exercised the political power which, by section 2, art. 1, is declared to inhere in the people, and the law in no manner infringes the pledge to preserve a republican form of government.

Plaintiff in error cites *Vanzant v. Waddel*, 2 Yerg. 260, as authority against the validity of this law, and also *Janes v. Reynolds*, 2 Tex. 250, approving the former. As qualified by the last-named case, the doctrine announced in the former is

unobjectionable, and sustains this act as being a general law affecting alike all persons of that class in like conditions. *Wilder v. Railroad Co.*, 70 Mich. 382, 35 Am. & Eng. R. Cas. 162, and *Durkee v. Janesville*, 28 Wis. 464, rest upon a rule of construction which this court refused to follow in *Insurance Co. v. Chowning*.

The cases of *Railroad Co. v. Morris*, 65 Ala. 199, and *Railroad Co. v. Moss*, 60 Miss. 646, 20 Am. & Eng. R. Cas. 555, cited, are based upon a construction of the constitutions of those states, the provisions of which are in the main the same as our own; but we believe that the construction given is not consistent with the well-settled rules established by our own court, sustained by the best authorities. *Dow v. Beidelman*, 49 Ark. 455, 31 Am. & Eng. R. Cas. 14, and *Railroad Co. v. Dey*, 82 Iowa, 312, 45 Am. & Eng. R. Cas. 391, sustain statutes which allow the recovery of attorney's fees in suits for damage on account of overcharges in freight-rates by railroad companies; and *Wortman v. Kleinschmidt*, 12 Mont. 316, upholds a statute which gave attorney's fees in suits to foreclose liens in certain classes of claims. Statutes permitting the recovery of attorney's fees in suits for the value of stock killed by railroad companies have been held by the courts of many of the states to be valid. *Railway Co. v. Duggan*, 109 Ill. 437, 10 Am. & Eng. R. Cas. 489; *Perkins v. Railway Co.*, 103 Mo. 52.

It is true that in some of the cases, and we believe the greater number of them, the courts have sought to justify the exercise of this power as being a penalty to enforce the statutory duty to fence the tracks of railroads. Counsel for plaintiff in error seems to admit that upon this ground the statute might be sustained, but we cannot see that it is necessary to assign any particular reason for the exercise of constitutional power by a legislative body.

The act in question in this case embraces different classes of claims. It provides for attorney's fees in each of them, upon the same conditions, without reference to the origin of the right. Some must arise out of contract, while others are for damages for torts committed. In each case the claimant must make affidavit to the amount of the claim, and present it to the railroad company, allowing 30 days for investigation. Attorney's fees are not allowed except when suit is made necessary by refusal to pay, and then only in cases wherein an attorney is actually employed, and the full amount claimed is recovered. It is clear that the attorney's fees are given to reimburse the plaintiff in the suit for the costs necessarily incurred in prosecuting the claim. If the claim is unjust to the full amount or in part, it is to be presumed that the court

will not give judgment for plaintiff, and no attorney's fee can be recovered; if just, it can be paid, and no such liability will be incurred by the railroad company.

There is no error in the judgment of the district court nor in that of the court of civil appeals, and the judgments of both courts are affirmed.

Attorney's Fees in Stock-killing Cases.—See *Illinois Central R. Co. v. Crider* (Tenn.), 56 Am. & Eng. R. Cas. 157, and note 166; *Gulf, Colorado & Santa Fe R. Co. v. Ellis* (Tex.), 49 Am. & Eng. R. Cas. 509, and note 515; *Peoria, Decatur & Evansville R. Co. v. Duggan* (Ill.), 20 Am. & Eng. R. Cas. 489.

Constitutionality of Florida Statute Allowing Recovery of Attorney's Fees in Stock-killing Cases.—In *Jacksonville, T. & K. W. R. Co. v. Prior* (Fla., July 16, 1894), 15 So. Rep. 760, it was held that the provision in the second section of the act of 1887, c. 3742, for the allowance of reasonable attorney fees in case of suit and recovery for live stock killed, as provided in the statute, is not in violation of any constitutional inhibition against such legislation. The court said: "The remaining assignment of error requiring consideration is that the verdict was erroneous in including an attorney fee for plaintiff. This objection is not that the attorney fee was not sufficiently proven, but that the provision in the statute allowing attorney fees is unconstitutional. A statute in Alabama provided that any corporation, person, or persons owning or controlling any railroad in that state, or any complainant against such corporation, person, or persons, taking an appeal from a decision rendered by a justice of the peace in a suit for damages brought under the provisions of an act defining and regulating the liability of railroads for damage to live stock, and failing to sustain such appeal, or to reduce or increase the judgment before the appellate court, shall be liable for a reasonable attorney's fee incurred by reason of such appeal, to be assessed by the court, not to exceed \$20, and the attorney's fee shall be part of the costs, and collected as such. The provision in reference to the attorney fee was declared void, as being violative of that equality and uniformity of rights and privileges which, by the principles of the constitution, state and federal, are secured to all persons, and as creating unequal and unjust discrimination against a particular class of litigants. *Railroad Co. v. Morris*, 65 Ala. 193. The Mississippi court, in the case of *Railroad Co. v. Moss & Co.*, 60 Miss. 641, declared unconstitutional and void the following statutory provision, viz.: 'That whenever an appeal shall be taken from the judgment of any court in any action for damages brought by any citizen of this state against any corporation, a reasonable attorney fee for the appellee shall be assessed by the court and certified by the clerk of the court or justice of the peace, as the case may be, to the appellate court, and, upon affirmance of the judgment, a judgment for the amount so assessed shall be rendered in favor of the appellee and against the appellant, and the sureties on his appeal-bond, and collection thereof shall be had in the same manner as of other judgments rendered on appeal; provided the fee so assessed shall not be less than fifteen dollars in appeal from the court of a justice of the peace, nor less than twenty-five dollars in appeal from the judgment of a circuit court.' In the case referred to the court said: 'The subjection of every unsuccessful appellant to a charge for the fee of the attorney for the appellee would afford no ground for complaint, as unequal, for it would operate on all; and such a rule for the unsuccessful appellant in certain classes of actions, tested by the nature and subject of the actions, would be equally free from

objection on the ground of its discriminating character. But to say that where certain persons are plaintiffs, and certain persons are defendants, the unsuccessful appellant shall be subjected to burdens not imposed on unsuccessful appellants generally, is to deny the equal protection of the law to the party thus discriminated against.' A statute in Arkansas provided, in substance, that, whenever any stock should be killed by a railroad in that state, the owner of the stock or the railroad company could demand an appraisement by sworn appraisers,—one to be selected by each party,—and, if the appraisers so selected could not agree, they to select a third appraiser. Should either party decline to select an appraiser as provided by the statute, when notified, the appraiser selected by the other party demanding the appraisement was authorized to select an appraiser, and proceed to ascertain the value of the stock killed. The act further provided that if the company failed, for 30 days after delivery of the appraisement to its agent, to pay the amount assessed, the owner could sue for damage done to the stock, and recover, in addition to the amount assessed as damages for killing or injuring the stock, a reasonable attorney fee for the plaintiff, and, in any court to which an appeal should be taken, a reasonable attorney fee should be allowed in that court, to be taxed and collected as other costs in the case in such court; but if the company tender the full amount of such appraisement within the 30 days, and the same be refused, and suit instituted for the damage to such stock, unless the owner recovered a greater amount than that tendered, the court trying the case was required to assess a reasonable attorney fee for the defendant, and in case of appeal the appellate court was required to assess such attorney fee for the defendant, to be taxed and collected as other costs in such court. This act was declared unconstitutional in the case of *Railway Co. v. Williams*, 49 Ark. 492, 31 Am. & Eng. R. Cas. 555. A statute in Michigan required railroad companies to fence their tracks, and provided that, until the fences and cattle-guards required should be constructed, the companies should be liable for all damage done to cattle, resulting from a failure or neglect to construct said fences and cattle-guards, to be recovered in any court of competent jurisdiction, together with an attorney's fee of \$25, to be taxed as costs against the defendant in case of recovery in the action. This act was declared unconstitutional in the case of *Wilder v. Railway Co.*, 70 Mich. 382, 35 Am. & Eng. R. Cas. 162, and is, we concede, an authority directly in favor of the position of appellant. Corporations, it must be conceded, have equal rights, as to the privileges granted to them, with natural persons, in the courts of justice, as they may sue and be sued with respect thereto as natural persons, and the law must be administered with the same equality and justice when applied to the one character of persons as to the other. Unless there is some legal and constitutional ground authorizing the legislature to impose upon a railroad corporation the burden of a reasonable attorney fee in addition to damages to stock injured by reason of a failure to fence its track, or, to speak more accurately, as to the powers of the legislature, if there is a constitutional inhibition, state or federal, against the right to impose such fee in a suit against a railroad company to recover damages done to stock by reason of a failure to fence as required by statute, then the act in question must be declared void, but if it does not conflict with some constitutional provision it is the duty of the courts to enforce it. Statutes allowing such a fee have been held constitutional under provisions in bills of rights similar to our own. The theory upon which railroad corporations can be required by the legislature to fence their tracks is protection against accidents to life and property in conducting such business. It appertains to the police power of the state to protect life and property in any business or employment, whether in the charge of a private individual or a corporation.

When the legislature requires railroads to fence their tracks, a public duty is thereby imposed upon them, and they can be coerced in the performance of this duty by the imposition of penalties for a failure to comply. This view, we think, is fully sustained by the courts. *Corwin v. Railroad Co.* and *Blair v. Railroad Co.*, *supra*; *Railway Co. v. Duggan*, 109 Ill. 537; 20 Am. & Eng. R. Cas. 489; *Railway Co. v. Mower*, 16 Kan. 573; *Railway Co. v. Humes*, 115 U. S. 512; 22 Am. & Eng. R. Cas. 557. The case last cited from the United States supreme court involved the constitutionality of a Missouri statute requiring railroad companies to fence their tracks, or become liable in double the amount of all damages done to stock straying upon the tracks, and occasioned by the failure to construct such fences. Judge FIELD, who wrote the opinion of the court, after stating that the state legislature had the right, by virtue of its police power, to require railroad companies to fence their tracks, says: 'In few instances could the power be more wisely or beneficially exercised than in compelling railroad corporations to inclose their roads with fences having gates at crossings, and cattle-guards. The speed and momentum of the locomotive render such protection against accident in thickly-settled portions of the country absolutely essential. The omission to erect and maintain such fences and cattle-guards, in the face of the law, would justly be deemed gross negligence; and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed, and it is not a valid objection that the sufferer, instead of the state, receives them. That is a matter on which the company has nothing to say, and there can be no rational ground for contending that the statute deprives it of property without due process of law.' In the case of *Railway Co. v. Mower*, *supra*, Judge BREWER discusses the question fully, and the decision was that the legislature had the right to provide that a reasonable attorney fee should be allowed to a successful plaintiff in a suit to recover damages to live stock caused by the failure of a railroad company to fence its tracks when required by law to do so. We think the correct view is announced in this decision. The Illinois case referred to sustains the same view. The acts declared void in Alabama and Mississippi had features which distinguish them from our statute on the subject. They attempted to impose a penalty, in the guise of attorney fees, for the privilege of prosecuting an appeal. In neither of these acts, nor in the one in Arkansas, were the railroad companies required to fence their tracks, and the attorney fees allowed in suits to establish damages to stock by reason of a failure to fence. Other differences might be pointed out, but we do not deem it necessary here. Our statute applies to all railroad corporations and persons operating railroads in this state, and cannot be said to be a special law applicable to an individual class. All of the same class are affected by it."

COHOON

v.

CHICAGO, BURLINGTON & QUINCY R. CO.

(Iowa Supreme Court, January 31, 1894.)

Application of Railroad-fence Statute to Horses Harnessed to Wagons.—A statute (Code, § 1289) rendering a railroad company which fails to fence against live stock running at large, liable for injuries to, or the killing of such stock, and prohibiting a greater rate of speed than that specified, within depot grounds necessarily used by the company and public where no such fence is built, applies only to cases of damage or injury to live stock running at large, and has no application to injury or damage to horses, and a wagon harnessed thereto.

Same—Effect of Use of "Public" in Statute.—"Public" in that portion of the section relating to the rate of speed within depot grounds, does not have the effect to make the section of general application.

What Constitutes a Negligent Rate of Speed.—No particular rate of speed can be said to be *per se* evidence of negligence in the absence of statutory regulations, but the rate maintained in any particular case may be considered in connection with other matters as showing negligence.

APPEAL from Adams county district court.

James G. Bull and *Thomas L. Maxwell*, for appellant.

Smith McPherson and *H. T. Granger*, for appellee.

KINNE, J.—1. The petition charges the defendant with negligence in running its train, which struck defendant's wagon and caused the injuries, on the depot grounds in the city of

Case stated. Villisca, at a greater rate of speed than eight miles per hour. It is averred that by reason thereof the accident happened, and that plaintiff did not contribute thereto. It is also claimed that defendant was guilty of negligence in the speed at which it ran its train, regardless of the statutory negligence pleaded. The answer was a general denial.

The court, at the close of plaintiff's testimony, and on defendant's motion, directed the jury to return a verdict for defendant, which was done.

2. The first question raised for our consideration is as to whether defendant was guilty of statutory negligence, in running its train at a greater rate of speed than eight miles an hour within the depot grounds of defendant. There

Liability of company under statute. is no dispute as to the facts touching this matter. All the evidence showed that the train, at the time of the accident, was running at a speed of from 25 to 35 miles an hour upon depot grounds necessarily used by

the company and the public. The statute relied upon by appellant is Code, § 1289.

In order to present the matter intelligently, it is necessary to set out this section, as the particular clause in controversy is so connected with the balance of the section that, to properly construe it, it should be read in connection therewith. The section reads: "Any corporation operating a railway, that fails to fence the same against live stock running at large at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. And, in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglects to pay the value of or damage done to any such stock within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served on any officer, station or ticket agent employed in the management of the business of the corporation in the county where the injury complained of was committed, such owner shall be entitled to recover double the value of the stock killed or damages caused thereto; provided, that no law of this state, nor any local or police regulations of any county, township, city or town, regulating the restraint of domestic animals, or in relation to the fences of farmers or landowners, shall be applicable to railway tracks, unless so specifically stated in the law or regulation. The operating of trains upon depot grounds necessarily used by the company and public, where no such fence is built, at a greater rate of speed than eight miles per hour, shall be deemed negligence and render the company liable under this section. And provided further, that any corporation operating a railway shall be liable for all damages by fire that is set out or caused by operating of any such railway, and such damages may be recovered by the party damaged in the same manner as set forth in this section in regard to stock, except to double damages."

The original of this section was enacted in 1862. See chapter 169, § 6, Acts 9th Gen. Assem. As originally passed, the act did not contain any provision limiting the speed of trains upon depot grounds. That provision first appears in the Code of 1873, and in its present form. The section, as it now reads, contains a provision making railway companies liable for killing stock running at large, at all points where they have a right to fence, and have not done so, if the damage or injury resulted from a want of such fence. It contains a provision making such companies liable for damages by fire set out or

caused by them in the operation of their roads, and also the provision in controversy, relating to the rate of speed upon depot grounds. We think the provision in controversy has no relation to a case like that at bar.

Before this speed-limit clause was inserted in this section, the section fully provided for liability for damages to live stock running at large, at all points where the company had a right to fence its right of way. This court had repeatedly held, after this original section was adopted, that railway companies were not required to fence where, in view of the public convenience, it would not be fit, proper, or suitable to do so. We need not cite the cases. The covered depot grounds. There was then no statutory provision whatever touching the liability of railway companies for damages to stock which might be injured while running at large at depot grounds, or other places where the necessities of the public in connection with the railway company were such as to prevent the latter from fencing the track. It was for the purpose of affording statutory relief in such cases that this speed-limit clause was inserted in this section. It is urged that the language used is general, and must, therefore, be held to apply to all cases of injuries to persons or property at depot grounds. This court has already held that this section did not cover a case of an injury to a horse and wagon which were being driven across the tracks of a railway within the limits of depot grounds. It was said that: "As the horse killed was not running at large, the material inquiry is whether the plaintiff was entitled to recover under this section. This inquiry must be answered in the negative. It seems to us that it is not possible to construe the statute otherwise. This is what the statute plainly says. The only liability under it is for stock injured or killed, which is running at large." *Johnson v. Railway Co.*, 75 Iowa, 158, 35 Am. & Eng. R. Cas. 131.

It will thus be seen that this court has already said, in substance, that this statute has no application to anything except cases of stock running at large, and has expressly said that a case of stock killed on depot grounds by a train running at a rate of speed greater than eight miles an hour, and which is at the time being driven by the owner, is not within the protection of the clause limiting the rate of speed. If appellant's contention is correct, this provision limiting the rate of speed applies to all cases of damages to persons and of damages to stock whether running at large or in the control of the owner. There can be no reason why, if the words are to be construed generally, and without reference to the connection in which they are used, and without regard to what gave rise to their insertion in this section, they should be held to apply to a

case of injury to a person, and not to an injury to an animal being driven by that person. Yet such would be the result, unless we should overrule Johnson's Case.

The use of the word "public" in no wise tends to make this provision of the statute of general application. That, and the words preceding it in the same sentence, are simply descriptive of the place or places where the operation of trains at a greater rate of speed than eight miles an hour shall be deemed negligence. This provision of the statute is not ambiguous, nor do we think the legislative intention, as evidenced by the language used, is doubtful. In construing statutes we may take into consideration all acts relating to the same subject-matter. The legislature has expressly vested in cities and towns power to limit by ordinance the speed of trains. Code, § 456. There was then no need of another statutory provision covering the same matter within the same territory. No mischief remained to be remedied by a statute limiting the rate of speed upon depot grounds, as the several cities and towns in the state were clothed with ample authority touching that matter. There is then no seeming necessity, even, for giving this provision of the section the broad construction contended for by appellant, and which, to our minds, is not warranted by the language used, when we consider the circumstances under which the provision was enacted, and its evident object when viewed in the light of the balance of the section. We therefore hold that the provision under consideration applies only to cases of damages or injuries to live stock running at large. There was then no statutory negligence in this case.

3. As to negligence, other than statutory, it may be said that this court has frequently decided that no particular rate of speed can be said to be, *per se*, evidence of negligence, in the absence of statutory regulations. It may be considered in connection with other matters as showing negligence. *McKonkey v. Railroad Co.*, 40 Iowa, 205; *Artz v. Railroad Co.*, 44 Iowa, 284; *Latty v. Railroad Co.*, 38 Iowa, 250. In this case there is no evidence that the defendant was negligent in the rate of speed at which it ran its train. There is no claim that the whistle was not sounded or bell rung, and no other facts which show that the rate of speed at which the train was running was, under all the circumstances, such as that it can be said that defendant was guilty of negligence. It follows that as no negligence was established, as against the defendant, there could be no recovery in this action, regardless of the question of plaintiff's negligence, which, in the view we

Rate of speed
as negligence
per se.

have taken as to the other branch of the case, we need not consider.

The court properly directed a verdict for the defendant.
Affirmed.

Duty of Railroad Company to Fence.—See *Kelver v. New York, Chicago & St. Louis R. Co.* (N. Y.), 49 Am. & Eng. R. Cas. 551, and note 554; *Illinois Central R. Co. v. Crider* (Tenn.), 56 Am. & Eng. R. Cas. 157, and note 166.

When Stock will be Deemed to be "Running at Large."—The term "running at large," when applied to stock, implies that it is not under control. *Hinman v. Chicago, R. I. & P. R. Co.*, 28 Iowa, 491; *Hammond v. Chicago & N. W. R. Co.*, 43 Iowa, 168, 14 Am. Ry. Rep. 412.

The following have been held to be within the contemplation of statutes respecting animals running at large:

A sucking-colt which strayed from its dam, which was being led, and wandered upon the track at depot-grounds, *Smith v. Kansas City, St. J. & C. B. R. Co.*, 58 Iowa, 622; a horse 60 to 100 feet in advance of the person in charge of it, who was riding a second horse and leading a third, *Markham v. Great Western R. Co.*, 25 Up. Can. Q. B. 572; a horse with bridle on, which had broken away from the control of its owner, *Welch v. Chicago, B. & Q. R. Co.*, 53 Iowa, 632; a team of horses harnessed to a wagon, which had escaped from the control of the driver, *Inman v. Chicago & St. P. R. Co.*, 60 Iowa, 459; cattle which had escaped from the person in charge while being driven along a highway, *Smith v. Chicago, R. I. & P. R. Co.*, 34 Iowa, 96.

In the following instances the stock was held *not* to be running at large:

Cows left in a highway for the purpose of milking them, with intent to put them in an enclosure, *Bulkley v. N. Y. & N. H. R. Co.*, 27 Conn. 479; cattle grazing upon enclosed lands which had a railroad track running through them, *Gooding v. Atchison, T. & S. F. R. Co.*, 32 Ark. 150, 20 Am. & Eng. R. Cas. 466; stock in charge of a herder, subject to his control, *Keeney v. Oregon R. & N. Co.*, 40 Am. & Eng. R. Cas. 619, 19 Ore. 291; a cow which has escaped from a boy who was driving her, *Phillip v. Canadian Pacific R. Co.*, 1 Manitoba Rep. 110; stock grazing on an adjoining farm, which was not fenced off from the farm of the owner, and was used for grazing purposes by consent of the occupant, both farms being enclosed, *Missouri Pac. R. Co. v. Shumaker*, 46 Kan. 769; cattle in a highway upon the premises of their owner, *Johnson v. Minneapolis & S. L. R. Co.*, 42 Minn. 207; horses attached to a sleigh in charge of a driver in a drunken stupor, *Grove v. Burlington C. R. & N. R. Co.*, 75 Iowa, 163; a colt five weeks old, following its dam, which was being led, in view of a custom to allow colts of that age to follow their dams, *Hillyard v. Grand Trunk R. Co.*, 23 Am. & Eng. R. Cas. 154, 8 Ont. 583.

Duties and Liabilities of Railroad Companies as to Fences.—*Common-law Duty of Railroad Company to Fence*—*Rights of Owners of Cattle Other than Adjoining Owners.*—In *Morse v. Boston & L. R. Co.* (N. H., March 15, 1890), 28 Atl. Rep. 286, it appeared that a landowner, after removing cattle which had escaped from an adjoining lot to his land, kept them in his custody for a short time, turned them into a highway between sundown and dark and drove them across a railroad track, and then towards the home of their owner; that on the way home one of the animals escaped, and thereafter wandered on the track and was killed by a train in the night-time without any negligence of the employes of the railroad company, and it was held that the owner of the animal killed had no right of

recovery against the company, since it was not bound to fence against an animal left at large in the highway, and upon the further ground that when the animal entered the highway its owner was not an adjoining owner, and consequently had no rights as such against the company.

Duty to Fence Entire Right of Way.—In *Union Pacific R. Co. v. Knowlton* (Neb., Feb. 6, 1895), 62 N. W. Rep. 203, it was held that every railroad corporation in the state of Nebraska is required to fence its tracks, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, and that a point one mile distant from the nearest depot-grounds, not within the limits of any city, town, or village, remote from any railroad or highway crossing, and not necessary for use in making up trains, although occasionally used for such purpose, was not within the exception mentioned. *Distinguishing Railroad Co. v. Hogan*, 27 Neb. 801, 30 Neb. 686.

Duty to Fence Track Within City Limits, where it Intersects Unopened Streets.—In *Hughes v. Nashville, C. & St. L. R. Co.* (Tenn., Feb. 23, 1895), 29 S. W. Rep. 723, it was held that in the absence of any showing that highways within the limits of a municipality are not actually dedicated or opened to public use, a railroad company is not relieved of its duty to fence off its intersecting tracks.

In *Hughes v. Nashville, C. & St. L. R. Co.* (Tenn., Feb. 23, 1895), 29 S. W. Rep. 723, it was held that whenever it appears that a railroad track is intersected by streets and alleys, whether actually opened or merely dedicated to the public use upon a plat, and whether the city, town, or village is incorporated or not, the statutory duty to fence does not apply. The court said: "It is insisted, however, that this accident is shown to have occurred within the limits of an incorporated town, and that the statute, therefore, has no application. This question arose in the case of *Ells v. Pacific Railroad*, 48 Mo. 232. The court said: 'In regard to the first defense, it appeared that the portion of the town where the accident happened had not been laid out into lots, streets, and alleys, and that no road or street had been established to cross the railroad near that point. This action is prosecuted under the fifth section of the act concerning damages, etc. (Wag. St. p. 520, and the question raised for the first time in this court whether a railroad company is excused from fencing the track of its road when it runs through a town or city merely from that fact, and without reference to whether it thereby crosses the public highways of such city or town. The statute makes no exception in regard to towns, but only an implied one in the crossing of a public highway. Nor do the cases referred to enlarge the exception. Ordinarily a railroad track cannot run any considerable distance within a town without being crossed by some street either actually opened or merely established. In that case the fencing cannot be required, for it would shut up a street actually in use or one that has been laid out and dedicated, and may soon be opened. But where the corporation lines embrace portions of the adjacent country not actually laid out as a town, or so laid out that the streets cross the railroad, the reason for the exception does not apply, and the obligation to fence is as imperative as outside the corporation limits.' Mr. Thornton, in his recent work on *Railroad Fences and Private Crossings*, after a thorough review of all the authorities, reaches substantially the same conclusion as that announced in the case just cited. The author quotes an Indiana case in which the court said, viz.: 'The statute makes no provisions as to the places which may be left unfenced, but the courts, recognizing the necessity of excepting streets of towns and cities and places where the business of the railroad companies demands that no fences be made, have ingrafted exceptions upon the statute. These exceptions have been made, not to advance the private interests of railroad corporations, but to promote the public good by enabling

the corporations to discharge their duty to the public. These exceptions exist only where a necessity is shown.' Again, it was said in another case: 'But whenever a railroad company can build and maintain such a fence without interfering with the rights of the public, or with the free use of private property, then it is bound to maintain the fence, whether it be in a city, village, or in the country.' Thornton R. R. Fences, § 86.

"In another case it was said that there are places within an incorporated town where the railroad may fence, as where there are no streets or alleys, and the public travel would not be interrupted by such fence. Young v. Railroad Co., 79 Mo. 336, 19 Am. & Eng. R. Cas. 512. Such is particularly the case if the adjacent lands are used for farming purposes (Elliott v. Railroad Co., 66 Mo. 683), or where a block of land is not intended for streets and alleys (Railway Co. v. Howell, 38 Ind. 447). But, whenever the land is regularly laid out in lots, blocks, or streets, the streets crossing the railroad, which streets have been dedicated to public use as public highways, it would be unlawful for the railroad to fence up the streets in such towns, and it would make no difference in such case whether the town so laid out into streets, etc., was incorporated or not. Gerren v. Railroad Co., 60 Mo. 405. Cited in Thornton R. R. Fences, § 88. Again, in the case of Lathrop v. Railway Co., 69 Iowa, 105, the court said: 'The acknowledgment and recording of the plat operated to vest in the public the right to occupy and use the ground designated as streets and alleys for highway purposes. This right accrues to the public at once upon the acknowledgment and recording of the plat, and continues until it is divested by some act of the public authorities or lost by adverse possession. * * * The fencing of the track at the place of crossing against live stock running at large would have the effect to exclude the public in many cases from using the highway at that place, and it follows necessarily that the right to do this does not exist.' We think those authorities lay down the correct rule."

Duty to Fence Depot and Station Grounds.—In Grondin v. Duluth, S. S. & A. R. Co., 100 Mich. 598, which was an action for the killing of a horse about three or four hundred feet from a station, it was held that at least as much of the track and grounds outside of such switches as was required for actual use in reaching side-tracks was a part of the station-grounds, to which the statutory requirement to fence did not apply. Following McGrath v. Railroad Co., 57 Mich. 555. See note to this case in official report.

In Hughes v. Nashville, C. & St. L. R. Co. (Tenn., Feb. 23, 1895), 29 S. W. Rep. 723, it was held that statutes creating a liability against a railroad company for a failure to fence its track do not apply to highway crossings nor to depot and station grounds. Citing Railroad Co. v. Lull, 28 Mich. 510; Soward v. Railroad Co., 30 Iowa, 551.

Duty to Formally Separate or Dedicate Depot-grounds or to Put up Notice of its Limits.—In Grondin v. Duluth, S. S. & A. R. Co., 100 Mich. 598, which was an action for the killing of a horse near a station, the question in issue was, whether the place of the injury was within the depot or station grounds, which, by the statutes the company was not obliged to fence, and it was held that a railroad company is not required to make a formal separation or dedication of its station-grounds, nor to put up notices of their limits, and that this is especially so in a new or unsettled country.

Failure of Company to Fence Properly—Leaving Traps for Animals.—In McCracken v. Chicago, R. I. & P. R. Co. (Iowa, May 17, 1894), 58 N. W. Rep. 1085, it was held that where the manifest purpose of a statute is to require the track rather than all of the right of way to be fenced, the company has no right by omitting a part of the right of way to leave traps at

highway crossings which will prevent animals running at large from escaping from passing trains.

Liability of Company for Injury to Animals on Track at Place where no Obligation Exists to Fence.—In *Hughes v. Nashville, C. & St. L. R. Co.* (Tenn., Feb. 23, 1895), 29 S. W. Rep. 723, it was contended by the defendant company that if an animal gets upon the track at a highway crossing, in depot-grounds, or other place where the track is not required to be fenced, the mere fact that the fence at the place of injury was defective or torn down, or was never erected, would not render the railroad liable, and the court said: "It is the condition of the road at the place where the animal entered upon the track, and not its condition at the *locus in quo* of the accident, that is material in determining whether the railroad has complied with its statutory duty to fence its track. *Railway Co. v. Quick*, 109 Ind. 295; *Railway Co. v. Parker*, 109 Ind. 235; *Railroad Co. v. Caldwell*, 38 Ill. 280; *Shear & R. Neg.* § 436. So then in this case, if nothing else appeared, the company would not be liable for the omission to fence at the place where the accident occurred, since the mare entered upon the track at a point where the road was not bound to fence. But it will be observed the statute not only imposes upon the company the duty to fence, but likewise the duty to construct sufficient cattle-guards. And while the company is not liable for having failed to fence its depot-grounds where the mare entered upon the track, yet it is obvious that if sufficient cattle-guards had been provided, as required by the statute, the animal could not have passed up this track for a distance of three-quarters of a mile. So that this contention must fail."

Liability for Injury Resulting from Animal Getting on Track Through Open Gate in Fence.—In *Manwell v. Burlington, C. R. & N. R. Co.* (Iowa, January 22, 1894), 57 N. W. Rep. 442, the only facts pleaded against the defendant were that it neglected to close the gate, and failed to maintain a fence, and the court, in its findings, adhered to the issues, and found that the company had fenced its line, and that a gate therein had been left open by "some one unknown," through which the horses, for the injury to which the action was brought, entered onto the right of way, and it was held that if it appeared that the horses were injured because of the neglect of the company to close the gate, it became liable.

Liability for Killing Stock which has Escaped Through Failure of Landowner to Comply with Fence Law.—In *Morse v. Boston & L. R. Co.* (N. H., March 15, 1890), 28 Atl. Rep. 286, it was held that under a statute, the manifest object of which was to establish the right and obligations of tenants of adjoining occupied closes respecting the making and maintaining of partition fences, and leaving the rights of persons not having any interest in either of the adjoining closes to be defined and protected by the common law, a railroad company is not liable for the violation by a landowner of the statutory duty to maintain his part of the fence between his field and an adjoining pasture, where, because of the insufficiency of such fence an animal escapes from such adjoining pasture, afterwards comes upon the right of way of the company, and is there injured. The court said: "Railroads are not an exception to the rule that the duty of fencing against cattle on adjoining land is limited to cattle that are rightfully there. *McDonnell v. Railroad Co.*, 15 Mass. 564-566; *Jackson v. Railroad Co.*, 25 Vt. 160; *Woolson v. Railroad Co.*, 19 N. H. 267, 269, 270; *Towns v. Railroad Co.*, 21 N. H. 363; *Cornwall v. Railroad Co.*, 28 N. H. 161; *Chapin v. Railroad Co.*, 39 N. H. 53; *Mayberry v. Railroad Co.*, 47 N. H. 391; *Giles v. Railroad Co.*, 55 N. H. 552, 553, 555, 556. Like other occupiers and owners of land, the defendant is not liable to the plaintiff for not fencing against his cattle when they are roaming across Glover's field under such circum-

stances that the plaintiff would be liable to the defendant for damage caused by their passing from the field into the defendant's road."

Existence of Fence Erected by Owner as Affecting Liability of Company for Failure to Comply with Statutory Requirement to Fence.—In *Norfolk & W. R. Co. v. McGavock's Admrs.*, 90 Va. 507, it was held that where a railroad company fails to fence as required by statute, in an action for the killing of stock on the track at a place at which it has not fenced, the company cannot escape liability by showing that a lawful fence which was erected by the landowners existed at the place in question, and that consequently there was no obligation on its part to erect a fence as required by the statute. The court said: "The failure of the company to erect a lawful fence along the line of its roadway, between the inclosed land of the plaintiffs' interstate and its roadway, as expressly required by law, makes it amenable to the penalty of the law for its neglect or violation of the requirement of the law; and the fact that the owner of the land has himself endeavored to protect his stock ranging upon his inclosed land, by building a fence, does not condone or excuse the disobedience to and neglect of the mandate of the law by the railroad (defendant) company; and the owner of stock getting injured by the railroad cars or servants at a point on its line through his inclosed lands is entitled to recover for the injury or killing of his stock, if the defendant company has failed or refused to comply with the law requiring it to erect and keep in order at that point a lawful fence. See Code 1887, c. 52, §§ 1258, 1259, 1261, 1262; *Id.* c. 93, § 2038; 7 Am. & Eng. Enc. Law, pp. 907, 927, and cases cited in note 2; *Id.* p. 934, and note 2."

Proof of Temporary Repair of Fence as Relieving Company from Liability for Stock Found Killed on Track.—In *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 28, 1895), 61 N. W. Rep. 1058, it was held that the fact that fence was temporarily repaired by a railroad company on one afternoon, and that stock was found killed on the track the next morning, was not sufficient to relieve the company from liability.

Sufficiency of Evidence to Justify Finding of Insufficient Repair of Fence.—In *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 28, 1895), 61 N. W. Rep. 1058, it appeared that a fence had been partially torn down by a third person, and there was evidence to the effect that thereafter one of the employes of the defendant company temporarily replaced it, and that the evening before the killing of the stock the fence was sufficient to turn stock, and it was contended by the railroad company that the fence must have been displaced by a trespasser, and it was held that the jury were warranted in finding that the animals killed got upon the track because of the fence not having been properly replaced.

What Constitutes Statutory Repair of Fences—Iowa Statute.—In *Moeckley v. Chicago & N. W. R. Co.* (Iowa, Dec. 17, 1894), 61 N. W. Rep. 227, it was held that a statute (Laws 1888, ch. 30) which provides that all railroad companies "which have not already erected a lawful fence, shall construct, maintain, and keep in good repair a suitable fence of posts and barb-wire, or posts and boards on each side of the track. * * * Said fences to be constructed either of five barbed wires, securely fastened to posts; said posts to be not more than twenty feet apart, and not less than fifty-four inches in height, or of five boards securely nailed to posts, said posts to be not further than eight feet apart, and said fence to be not less than fifty-four inches in height. Provided: when said railroad corporations, who have now their fences built, shall when they rebuild or repair their fences the same shall be built as provided in this act. * * * Provided further, that nothing in this act shall in any way limit or qualify the liability of any corporation or person owning or operating a railroad that fails to fence the same against live stock running at large for any stock injured or killed by reason of the want of such fence as now provided for in section 1289 of the Code of 1878,"

requires so far as the repairs therein authorized are concerned, a virtual rebuilding of a portion of the fence, requiring new posts to be put in, and the repairs to be of such a general character as to involve and include the structure and height of the fence, and that merely nailing on loose boards and putting on boards in place of those which have become defective, and in which work no new material is used, does not constitute repairs within the meaning of the statute.

Liability of Company for Injury to Animal Because of Breach of Contract on its Part to Construct Cattle-guard.—In *Harrow v. Ohio River R. Co.* (W. Va., Jan. 20, 1894), 18 S. E. Rep. 926, it appeared that a railroad company, by contract under seal, bound itself to make and maintain necessary cattle-guards at the boundary lines of the premises of H., which it failed and neglected to do, and that its trains, running through said premises, frightened and drove H.'s horses off his premises, through the gap where the cattle-guard was to be made, into the premises of an adjoining owner, where the track was fenced, whereby and by reason whereof said train struck the horse, and caused its death, and it was *held*, the railroad company might be sued before a justice, and held liable therefor, as for a wrong, under section 26, c. 50, of the Code. *Citing* *State v. Lambert*, 24 W. Va. 399; *Poole v. Dilworth*, 26 W. Va. 583.

Liability of Receiver of Unfenced Railroad for Killing Stock—Texas Statute.—In *International & G. N. R. Co. v. Bender* (Tex., May 31, 1894), 26 S. W. Rep. 1047, it was held that under Sayles' Civil Statutes, art. 4245, which provides, that "each and every railroad company shall be liable to the owner of stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction, of the amount. If the railroad company fence in their road, they shall only then be liable in case of injury resulting from the want of ordinary care." And the 6th section of the act of March 19, 1889, which recognizes the liability of a receiver of a railroad property for stock killed while the railroad is managed by him, a receiver having exclusive control and management of an unfenced railway, is liable for the value of cattle killed on it by cars of the road to the like extent as the company would be, without proof of negligence. *Citing* *Railroad Co. v. Wood*, 24 Kan. 619; *Railroad Co. v. Fitch*, 20 Ind. 498; *Railroad Co. v. Cauble*, 46 Ind. 277; High. Rec. 397; *Railroad Co. v. Russell*, 115 Ill. 52, 23 Am. & Eng. R. Cas. 149. The court said: "The liability of a receiver, unless based on some personal wrong, is solely official, and compensation for injury inflicted while a railway company is controlled by a receiver must be made, if at all, from funds belonging to the corporation; and no reason is perceived why the rule of evidence applicable, in terms, to a railway company should not apply to a receiver when engaged in operating a railway. The reasons for enforcing such a rule are as forcible when a railway is under the exclusive control of a court and its receiver as when it is operated by the company to which it belongs; and we see no reason to doubt the propriety of applying the same rules of evidence, and the same general rules of law, in determining the liability of a receiver which would be applied in determining the liability of a railway company in all cases in which the action is not based on a statute which by its terms excludes such application. Neglect to fence a railway is chargeable to the company owning it; and if it can have no ground for complaint because funds belonging to it, even while in the hands of a receiver, may be appropriated in satisfaction of claims for stock killed, no reason is seen why a receiver, who has no personal interest in such funds, should be heard to complain on account of their appropriation to satisfy a claim arising while the road is in his hands."

ATCHISON, T. & S. F. R. Co.

v.

TANNER.

(Colorado Supreme Court, April 16, 1894.)

Penal Nature of Act of 1887, Imposing Liability for Double Value of Animal Killed When Company Fails to Record Description of Animals, Etc.—The act of 1887 providing that a railroad company shall be liable for twice the full value of each animal killed by it in case it fails to comply with the statute by recording a description of the animal, and marking its hide, is a penal statute.

Necessity of Pleading Statute of Limitations in Action for Penalty.—The general rule in civil actions is that the statute of limitations must be pleaded, or it is deemed waived; but, in an action for a penalty, a defendant is entitled to the benefit of the statute under a plea denying plaintiff's cause of action.

Liability of Company for Conversion of Animal Killed by It.—Where a railroad company kills an animal of another, and converts the same to its own use, it may be made liable in damages, whether the killing be negligent or otherwise.

APPEAL from Fremont county district court.

Action for damages for the destruction and conversion of personal property, and for penalties under the statute. The causes of action in plaintiff's complaint are of four kinds; the first five counts allege, in substance, that the defendant company negligently ran its locomotive and cars against and over, and thereby killed, seven certain American steers of plaintiff of the alleged value of \$35 each, and then and there converted said steers to the use of defendant. The killing and conversion of the steers are alleged to have been between November 10, 1888, and February 16, 1889.

The sixth count alleges the killing and conversion in like manner of a certain steer the property of one Phillips, and that Phillips afterwards, and before the commencement of this action, assigned and transferred his demand and cause of action therefor to plaintiff for value.

The seventh count of the complaint is for the burning and destruction of certain grass by the operation of defendant's line of railroad, said grass being the property of plaintiff, and of the alleged value of \$150.

The last five counts are founded upon the act of 1887 (page 420), which reads as follows: "Every railroad company shall

keep a book at its depot, in the county seat of each county, through which their road runs : provided, that said road runs or passes through the county seat. If such railroad does not pass through the county seat, then such book shall be kept at its depot in the principal town in the county through which it passes. And it is hereby made the duty of the said company to cause to be entered in said book, within fifteen (15) days after the killing of any animal, a description, as nearly as may be, of such animal, its color, age, marks, and brands, and shall keep said book subject to the inspection of persons claiming to have animals killed. And shall also attach to each hide or skin of each and every animal killed, and keep thereon a good and substantial tag, such as is commonly used as a shipping tag, upon which shall be plainly marked the color, age, marks, and brands of such hide, corresponding with the entry of the description of such animal in the book as above provided. And such tag shall be so attached in a good and substantial manner. Should any company fail to keep such book, or to attach such tag, as above provided, to each and every hide or skin, or to file such notice in the manner herein provided, or to enter such notice therein in the manner in this act provided, or to enter therein such description of any animal killed, for a period of fifteen (15) days thereafter, such company shall be liable to the owner of such animal to an amount twice the full value thereof."

The last five causes of action allege the ownership and the killing of the seven steers of plaintiff, of the alleged value of \$35, as in the first five counts and thereafter it is alleged that the defendant company failed to keep the book provided by said statute for the entering of the description of animals so killed, and also failed and neglected to attach to the hides or skins of such animals a good and substantial tag, or any tag, with the color, age, marks, and brands of such hide plainly marked upon it, corresponding to the entry in said book, as provided by statute.

Each of the steers is alleged to be of the value of \$35, and in each of the last five counts a recovery is prayed "in the sum and penalty of seventy dollars."

At the close of plaintiff's evidence, the trial court, on defendant's motion, rendered a judgment of nonsuit as to the first, second, third, fourth, fifth, sixth, and twelfth causes of action; and, at the close of defendant's evidence, the court instructed the jury "to return a verdict for the plaintiff upon the causes of action as to which the said motion for nonsuit had not been sustained, which verdict is in words and figures as follows, to wit: "We, the jury, find the issues for the plaintiff in the following causes of the complaint: In cause seven, and

assess his damages thereon at \$80; in cause eight, and assess his damages thereon at \$84; in cause nine, and assess his damages thereon at \$192; in cause ten, and assess his damages thereon at \$64; in cause eleven, and assess his damages thereon at \$64." Judgment in favor of plaintiff was rendered on such verdict.

Defendant appeals.

Charles E. Gast and *C. D. Bradley*, for appellant.

Macon & Locke, for appellee.

ELLIOT, J. (after the foregoing statement).—On this appeal, errors and cross-errors are assigned. Plaintiff complains of the judgment of nonsuit as to causes of action numbered 1, 2, 3, 4, 5, 6, and 12; defendant complains of the verdict directed against it on the remaining causes of action, except cause numbered 7. It was agreed on the trial that the value of the grass destroyed was \$80, and that plaintiff was entitled to recover that amount.

1. The last five causes of action were for the recovery of twice the value of each of the animals killed, respectively, as provided by the act of 1887 (Sess. Laws, p. 420). This sum was expressly declared for as a "penalty." The

Penal nature of statute. several offenses for which a recovery of the penalty was sought were committed more than a year prior to the commencement of the suit.

Defendant relies upon the following statute of limitations: "All actions and suits, for any penalty or forfeiture of any penal statute brought by this state, or any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense is committed, and not after that time." See Gen. St. 1883, § 2170; 2 Mills' Ann. St. § 2907.

It requires no extended discussion to show that the act of 1887, upon which the last five counts of the complaint are based, is a penal statute. The act imposes a penalty upon a railroad company in a sum twice the full value of each animal killed for the failure of the company to comply with the terms of the statute in respect to recording a description of the animal and marking its hide; and this, whether the killing was negligent or otherwise. The statute is not like one intended to remedy some defect of the common law; as, where a right of recovery is given to the widow, children, or personal representative of a person whose death has been caused by the wrongful act, neglect, or default of another. The cause of action in such cases, though statutory, nevertheless springs out of the principles of the common law, and is equitable and remedial in its nature.

Nor is the statute like those requiring railway companies to fence their lines of road, and providing that, if they fail so to do, they shall be liable for any animal killed while straying upon their unfenced track; for in such case it may be considered that the neglect to fence causes or contributes to the injury.

The statute invoked by plaintiff in this case imposes a penalty for omissions to do certain acts which could not possibly have contributed to the killing of the animals, since such omissions could not have occurred until after the killing. The statute upon which the last five causes of action are founded is clearly penal; and plaintiff evidently so regarded it when he sued for a recovery of twice the value of each animal as a "penalty." The validity of the act as a penal statute is not questioned in this case. *Wadsworth v. Railway Co.*, 18 Colo. 600, 56 Am. & Eng. R. Cas. 145; *Joyce v. Means* 41 Kan. 234; *Goodridge v. Railway Co.*, 35 Fed. Rep. 35; *Barnett v. Railroad Co.*, 68 Mo. 56; *Railway Co. v. Humes*, 115 U. S. 512, 22 Am. & Eng. R. Cas. 557.

2. In the county court the statute of limitations was not pleaded; on appeal in the district court, however, the plea was interposed, but was struck out on motion of plaintiff.

The general rule in civil actions is that the statute of limitations is a special privilege, and must be pleaded in apt time, or it is deemed waived. *Chivington v. Springs Co.*, 9 Colo. 597. But this rule does not apply to penal actions. The reason for the distinction is not difficult to understand. In an ordinary civil action the plaintiff asserts some legal or equitable right, usually vested in himself, independent of statute; and his right to recover is founded upon some claim or demand alleged to have accrued before the commencement of his suit. Hence the language of limitation acts applicable to such actions is that they shall be brought within a limited time "after the cause of action shall accrue," or "after the accruing of the cause of action." The language of the limitation act for penalties does not speak of the time when the cause of action accrued, but of the time when the offense was committed for which an action for a penalty may be brought. See Gen. St. 1883, c. 66.

Necessity of
pleading statute of limitations.

In a suit for a penalty the plaintiff has no cause of action independent of the statute. While the penal statute gives him the right to recover the penalty by suing for it, the limitation statute makes his cause of action dependent upon his bringing suit within a certain period; so that, if he fails to bring his suit within such period, he has no cause of action remaining.

Counsel for plaintiff concede that, where a statute giving a new cause of action also provides that the action shall be commenced within a limited time, the action must be commenced within such time, or it cannot be maintained. But they contend that the rule is different where the limitation is in a separate act.

We see no good reason for such distinction where the cause of action is for a penalty. The statute relied on by defendant expressly limits the time for commencing "all actions and suits for any penalty or forfeiture." The plea of the statute of limitations in this case was proper, though not absolutely necessary; hence the assignment of error as to the striking out of such plea need not be passed on. The time within which plaintiff might bring his action was of the essence of his cause of action, and so defendant was entitled to the benefit of the statute under a general plea denying the existence of plaintiff's cause of action. The action not having been brought until the expiration of one year after the offense was committed, plaintiff had no cause of action for the "penalty." See *Hodsden v. Harridge*, 2 Saund. 63, and notes; also, *Pike v. Jenkins*, 12 N. H. 255; *Moore v. Smith*, 5 Me. 490; *Com. v. Washington*, 1 Dana, 446; *Estill v. Fox*, 7 T. B. Mon. 552; *Watson v. Anderson*, Hardin, 466; *The Harrisburg*, 119 U. S. 199.

3. The cross-errors assigned require only brief consideration. The court was warranted in granting a judgment of nonsuit as to the fifth and twelfth causes of action; as to those counts, plaintiff practically abandoned his claim on the trial. But counts numbered 1, 2, 3, 4, and 6 state facts sufficient to constitute a cause of action, and the evidence under such counts was such as should have been submitted to the jury.

It is true the evidence did not show negligence on the part of the defendant company in killing the animals described in said counts, but the evidence did tend to show that the animals were converted to the use of defendant after the killing; and so the case should have been submitted to the jury to determine the issue upon common-law principles, with due regard to the substantial rights of the parties. As the case may be tried again, we shall not further discuss the evidence.

The judgment of the district court is reversed, and the cause remanded for further proceedings in accordance with this opinion, neither party to recover costs against the other in this court.

Reversed.

Killing Stock—Disposition of Carcass of Dead Animal.—See *McCauley v. Montana Central R. Co.* (Mont.), 49 Am. & Eng. R. Cas. 557, and note 563.

Sale of Skin of Animal Killed on Track—Right of Owner to Recover in Action for Wrongful Killing.—In *Morse v. Boston & L. R. Co.* (N. H., March 15, 1890), 28 Atl. Rep. 286, it appeared that an ox killed on a railroad track was abandoned by its owner, and that the section hands of the company removed the skin and sold it, buried the carcass, and deposited the proceeds of the sale of the skin with an officer of the company, and it was held that the removal and sale of the hide, after abandonment by the owner, was lawful, and that the proceeds of the sale should be disposed of on equitable principles, but that plaintiff could not recover such proceeds in an action brought by him in case for the killing of the animal.

JACKSONVILLE, TAMPA & KEY WEST R. CO.

v.

HARRIS.

(33 *Florida*, 217.)

Sufficiency, under Florida Statute, of Notice and Presentation of Claim for Stock Killed by Railroad Company.—A letter from an owner of live stock to a railroad company, notifying it of the killing of his stock by a train, giving also the time and place of the killing, and expressing a desire to be informed, as early as possible, what the company will pay him for the stock, is not inadmissible as evidence of notice and claim for damages under the statute making railroad companies that fail to erect and maintain fences sufficient to turn and exclude all live stock from their railroads, with stock-guards at certain crossings, on account of the omission of the letter to state the amount of the damage claimed; nor is a letter stating the amount claimed inadmissible because it was not written at the time of the killing, nor until 75 days after, or because it offers to take less than the owner believes he was entitled to. The two letters, therefore, *held* to constitute ample notice and presentation of claim under the statute.

Action Against Railroad Company for Killing Stock—Failure to Object to Insufficient Instruction.—Where an instruction is not calculated to mislead the jury, although not as full or specific as it might be, and no request has been made for a fuller instruction, no advantage can be taken by the losing party on account of such deficiency.

Right to Assume Presentation of Claim to Proper Representative of Company.—It cannot be assumed, as a matter of law, that the general attorney of a railroad company is not a proper officer or agent to notify and present a claim to for damages to live stock under the railroad-fence law, where the company has neither attempted to show that he was not such, nor made any objection to proof of demand upon him, on the ground that he was not such officer or agent.

Construction of Railroad-fence Statute—Presentation of Claim to "Agent or Officer" of Corporation.—The railroad-fence statute requires notice of claim to be given "to any general agent or officer of such corporation or person, or to any station, depot, or other agent or officer acting for said corporation in the county where the live-stock was killed or injured."

Held, that the words subsequent to the word "officer," where it appears the second time, do not qualify any of the preceding words except those after the word "person."

Same—Duty of Company—Open Bars or Gates at Crossings Without Fault or Consent of Company.—The general requirement of the railroad-fence statute, wherever the act is operative, is the erection and maintenance, on both sides of any railroad, of substantial fences sufficient to exclude or turn from the roads all live stock, or at least such stock as are orderly or not shown to be breachy, with the limitation, however, that, in lieu of fences, stock-guards shall be erected and maintained at public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining a railroad. Where there is no crossing of the character indicated, the duty is to maintain a fence of the required character; and, as between the owner of stock and the company, a gap and bars are to be regarded as a fence, and kept in the condition necessary to serve all the purposes of a prescribed fence. It seems that where a company has erected a sufficient fence, and it is thrown down without the company's knowledge, by the act of God, or by strangers without the company's knowledge or consent, the law accords to the company a reasonable time for ascertaining the fact and restoring the fence; and if any damage is caused by the fence being thus down, before there has been a reasonable time for the company to restore it after being so aware, or for learning of its being down and restoring it, the company will not be liable; and a doctrine, at least somewhat similar, is applicable where bars or gates at a crossing are left open without the company's consent or fault.

Same—Chargeability of Company with Acts of Persons Supplying Wood to Company and Leaving Opening in Fence.—Where there is a gap, with bars, in a railroad fence, at a place where there is no public or other authorized crossing, and the gap is used, with the knowledge of the company, by persons supplying the company with wood under contract, and engaged in hauling the same to a wood-rack on the road, to be used by the company's engines, and such bars are left down by such persons so engaged, and live stock pass through the gap, and go onto the road and are killed, the persons so leaving the bars down cannot be regarded as strangers to the company, but their acts will be regarded as the act of the company, and it will be held liable for the damage resulting to the owner of the stock.

Action Against Company for Killing Stock—Sufficiency of Declaration to Show that Damage was Caused by Violation of Fence Law.—A declaration alleging that the railroad company did not maintain fences on the sides of its railroad sufficient to exclude and turn live stock therefrom, by means whereof, and for the want of which fences, two horses of the plaintiff, without default or negligence on his part, strayed and went on such railroad, describing the point, at which place such a fence was necessary to exclude and turn live stock, which place was not in a town or city, nor at any crossing authorized by the statute, using its language in describing the same, and that, said horses so being on said railroad at the place stated, a certain engine ran upon and killed said horses, giving their value, is good as against a motion for arrest of judgment on the ground that the declaration does not show that the damage was caused by a failure to erect and maintain fences or stock-guards.

APPEAL from Volusia county circuit court.

RANEY, C.J.—The declaration, after stating that the defendant was a railroad corporation under the laws of the state,

operating a line of railroad in Volusia county on June 28, 1888, avers that the company, not regarding the statute in such case made and provided, did not then and there maintain fences on the sides of its railroad sufficient to exclude and turn live stock therefrom, by means whereof, and for the want of such fences, two horses of the plaintiff, without any default or negligence on the part of plaintiff, then and there strayed and went upon the said railroad at a certain place in township 14 S. of range 28 E., in said county, at which place such fence was then necessary to exclude and turn live stock from said railroad, and not where the said railroad then ran through a town or city, nor at a public crossing, nor at a crossing necessary for the use of owners or tenants of lands adjoining said railroad; and the said horses so being on the said railroad there, to wit, at the place in that behalf aforesaid, a certain engine and cars of the defendant, then driven and governed by divers agents of the defendant on the said railroad, then and there ran and struck upon said horses, and thereby said horses, each of the value of \$200, were killed, and wholly lost to the plaintiff; that more than 30 days prior to this action plaintiff gave notice and presented his claim in writing for the damage sustained by the plaintiff by the killing of said horses, as aforesaid, to a general officer of the defendant, in the county aforesaid, but the defendant failed to pay such claim for the space of 30 days thereafter, and has ever since failed and refused to pay such claim, or any part thereof,—and concluding properly.

The defendant pleaded: First, not guilty; second, that it had and did provide and maintain fences on the side of its track at the places and points named in the declaration, sufficient to exclude and turn live stock therefrom; third, contributory negligence upon the part of the plaintiff; and, fourth, that it had never been served with a notice in writing, as provided by the statute, and alleged in the declaration; and, the plaintiff having joined issue, there was a trial by jury, which resulted in a verdict for the plaintiff for the sum of \$302.50 damages, and, motions in arrest of judgment and for a new trial having been made and denied, judgment was rendered for the stated amount, and for \$114 costs.

The suit is founded upon the act of May 13, 1887, which, in so far as the purposes of this case call for a statement of its provisions, enacts that every railroad company operating a railroad in this state shall erect and maintain substantial fences on the sides of such railroad (except through towns and cities, unless said towns and cities require the same), sufficient to turn and exclude all live stock therefrom, with

stock-guards at all public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining such railroad; and, in case of a failure to erect and maintain said fences and stock-guards as aforesaid, such corporation shall be liable for all damages which shall be done by its engine or cars to any live stock, caused by a failure to erect or maintain such fences and stock-guards.

The statute also provides that, when any live stock is so killed or injured, the person entitled to damages therefor shall give notice and present his claim therefor to any general agent or officer of such corporation, or to any station, depot, or other agent or officer acting for the corporation, in the county where the live stock was killed, such notice or presentment of claim to be in writing; and if, after such notice, the corporation shall fail to pay the claim for the space of 30 days, suit can be brought on the claim; and if, as presented, it was reasonable and just, the jury or judge shall assess, as damages against the corporation, the actual damage to the live stock so killed or injured, and 50 per cent interest per annum on such damage from the day of the presentment of the claim, together with all reasonable attorney's fees.

It also enacts that if the corporation shall deem the claim presented to be unreasonable and unjust, and shall tender or offer to pay all reasonable or just damages for the stock so killed or injured, and the claimant shall refuse to accept the amount tendered or offered to be paid, and, upon the trial, the jury or judge, under the proofs, shall find a verdict for not more than the amount tendered or offered, the court or judge shall render judgment against the plaintiff for all reasonable costs, and such costs shall be deducted from the amount assessed as damage to the live stock; and the plaintiff shall be entitled to no attorney's fees. Acts 1887, pp. 114, 115; Rev. Stat. §§ 2271, 2272, 2275-2277.

The other facts are stated in the opinion.

J. R. Parrott and T. M. Day, Jr., for appellant.

B. M. Miller, for appellee.

RANEY, C.J.—The testimony shows that the horses of the plaintiff were killed near a wood-rack about a half mile from his home, and a mile and a half from the town of Seville, and were found there by the plaintiff and the section boss and his hands and others, early in the morning of June 28, 1888, lying on the side of the railroad, and that, as indicated by their tracks, they had walked

Additional
facts.

through a gap in the railroad-fence, and onto the railroad. The gap was used for hauling in wood for the locomotives by two men named Stephens, who are spoken of by one witness as owning the rack. There was another rack in the same locality, owned by another person, but on the opposite side of the gap. There was no railroad-crossing at the gap.

The plaintiff testifies that the gap was open when the horses were found, and he saw no bars or poles. One witness testified that he had seen bars or poles, about the size of his arm, up at the gap, but did not recollect that any were up when he and plaintiff found the horses on the named day. Another witness says they were down, and that he had seen the gap the evening before, between sunset and dark, and they were down then; he having met the Stephenses coming home just before he got to the gap.

The foreman of the section of the road where the horses were killed testified that it was a part of his duty to see that the road and fences were in proper condition, and that he found the horses on the morning stated, and that the bars were opened on the side that the Stephens rack was; that there were three bars provided for the gap, reaching from $3\frac{1}{2}$ to 4 feet from the ground; he had found the bars down before this, not knowing who left them down, and had got his men to put them up; that he had warned persons to put them up; thinks he went by the day before the accident at 12 o'clock, and the Stephens boys were in sight with a load of wood for the rack, and the bars were down, but he did not warn them to put them up, yet had done so before; that the wood-rack men hauling wood for the company were supposed to put up and take down the bars; that he had notified the company that it was a dangerous place, notifying the roadmaster, who "saw that they were kept up," and who went down there and got after these men about it; that witness did not shut the bars every night, as, if he had, he could not have done much of anything else; yet that he had them put up when he found them down, and would have done so on the day preceding the accident if he had not seen the cart coming with the load of wood. A section hand stated that he had put up the bars under the section-master's direction; that he saw the bars down on the day, and under the circumstances, stated by the section-master, and he never knew them to be left open by the section-master; and that the bars were not quite three feet high. The testimony as to the ownership and value of the horses need not be stated.

The first assignment of error is as to the admission in evi-

dence of two letters offered by the plaintiff. One of them is dated July 4, 1888, and is from the plaintiff, the substance of it being that the fast mail train going south on the morning of June 28th killed two horses of the writer near the 86-mile post, and that he was desirous of knowing what the company would pay him for them; that the killing had been reported by the section-master,—and requesting to be communicated with as early as possible relative to the matter, and to let him know what the company would do in the case.

Here it should be stated that the plaintiff, in testifying as to the killing of the horses and his finding them, said that he gave notice to the railroad company,—sent a letter to Gen. Mason,—and that they wrote back, and offered him eight dollars for the horses. The other letter bears date September 11, 1888, and is from B. M. Miller, Seville, Fla., to J. R. Parrott, attorney for defendant company. It states that Harris has retained him to prosecute his claim against the company for the two horses killed on June 28, 1888, and that, if the company was willing to settle the matter without suit, the plaintiff would take \$200 in full satisfaction of his claim, and, if it would not, the writer was instructed to bring suit at once; and asks for the company's decision at once.

The admission of the second letter was objected to on the ground that it was an offer of compromise, and not a notice, but the ground of the objection to the former letter is not given. The objections were overruled, and the defendant excepted.

Waiving, for the purposes of this case, the deficiency of the objection to the letter from Harris, we, in view of the letter from Miller, fail to see in the objection urged here good ground for excluding the letter from Harris. Such objection is that the letter does not set any sum as the amount of the damage, or present his claim. True, it does not state the amount of the claim; yet it presents a claim, and fully discloses the basis of it, and the deficiency as to the amount is fully cured by Miller's letter. The objection to Miller's letter, that it was not written at the time of the killing, is not good, the statute not making this an essential: and the other one, that it is an offer of compromise, is palpably without merit, even if we admit it is an offer to take less than the plaintiff believed himself to be entitled to. The two letters, considered together, constitute an ample notice and presentation of claims under the statute. Whether, in the absence of Miller's letter, the testimony of the plaintiff that, when he

gave notice to the railroad company, it wrote back and offered him eight dollars for the horses, would not supply the alleged deficiency of the plaintiff's letter, need not be considered.

The conclusion announced above disposes, also, of one of the charges requested by the defendant.

The second assignment of error is as to a charge in which the judge used, among others, the expression: "If you find that the plaintiff, after the killing of the horses, gave notice of such killing, as required by law, and made presentment of his claim in writing for such killing." The objection urged is that, as there was a question in the case whether or not the notice and claim had been presented to any one of the officers specified in the statute, the jury should have been instructed what the law was, in order that they might pass understandingly on that point. Under the facts of the case, we do not see that the instruction was calculated to mislead the jury. If defendant desired any further instruction, they should have asked for it. It cannot be assumed, as a matter of law, that the general attorney of the company (which Mr. Parrott is testified by one of the witnesses to have been) was not a general agent or officer of the company, within the meaning of the act, or that Gen. Mason (to whom, it must be concluded, the letter from the plaintiff was written) was not a proper officer or agent, within the meaning of the act, to give notice to. *Railroad Co. v. Truitt*, 24 Ind. 162. In the absence of any attempt upon the part of the company to show that Parrott was not an officer or agent of the company for the purposes of notice and demand under the act, the jury were justified in concluding that he was such an officer or agent. The conduct of the company in the premises is at least a tacit admission that he was; the notice to Mason was recognized by the company, in its offer of eight dollars, as having been given to a proper representative, and no objection to proof of demand upon Parrott was made on the ground that he was not a proper representative of the company.

Same—Officer
or agent—
Presentation
of claim.

Another charge requested by the defendant, and properly refused, may be disposed of by saying of the provision of the statute requiring notice of claim to be given "to any general agent or officer of such corporation, or person, or to any station, depot, or other agent or officer acting for said corporation in the county where said live stock was killed or injured," that the words subsequent to the word "officer," where it appears the second time, do not qualify any of the preceding words, except those after the word "person."

An instruction requested by the defendant, and the refusal

of which is made the basis of an assignment of error is:

Liability of
company for
act of third
persons in
leaving open-
ings in fence.

"If you find that the cause of the presence of the plaintiff's horses on the defendant's railroad track was the negligence of persons not the agents or servants of the defendant, in leaving down the bars provided by the defendant to close an opening in the fence, and that the defendant, its agents and servants, were not guilty of negligence in failing to replace the bars, you will find for the defendant."

A disposal of this point requires some observations upon the nature of the statute. The general requirement of the act is the erection and maintenance, by corporations and persons operating railroads in our state, of substantial fences on both sides of the railroads, and the fences must be sufficient to exclude or turn all live stock from the roads,—at least such stock as are orderly or not shown to be breachy. This requirement is not applicable in cities or towns unless they make it so. There is a limitation upon the general requirement, even outside of cities and towns, which is that, in lieu

Construction
of statute—
Duty of com-
pany.

of fences, stock-guards shall be erected and maintained at public crossings, and at such other crossings as may be necessary for the use of owners or tenants of land adjoining a railroad. In case of a failure, upon the part of a railroad company, to erect and maintain a fence of the character indicated wherever the statute so requires, the company is made liable for all damage by its engines or cars to any live stock, caused by a failure to erect or maintain such a fence. If a failure upon the part of the company to erect or to maintain the fence or stock-guard, as the case may be, at a place where the statute contemplates that one or the other shall be maintained, is the true cause of the injury, such neglect of duty makes the company liable.

Where there is no public crossing, nor a crossing that is necessary for the use of owners or tenants of lands adjoining a railroad, the duty is to maintain a fence of the character indicated. Here there is no crossing of any kind, and the simple question is, has such a fence as the law requires to exempt the railroad company from liability for injury to live stock been maintained? As between the owner of live stock and the company, the gap and bars are to be regarded as a fence, and the company's measure of duty is not diminished by the existence, of the gap and bars. It was at least the duty of the company to maintain the gap and bars in an efficient condition for excluding and turning live stock from the railroad. These gates, says the opinion in *Railway Co. v. Harris*, 54 Ill. 528, speaking of one at a farm crossing, are a part of the fence, and the duty to keep their fences in repair

includes the duty of keeping them safely and securely closed, so as to afford equal protection from stock getting upon their roads at such places as at other points.

It is true that where a company has erected a sufficient fence, and such fence is thrown or broken down without the company's knowledge, by the act of God, or by strangers without the company's knowledge or consent, the law accords to the company a reasonable time for ascertaining the fact and restoring the fence; and if any damage is caused by the fence being thus down, before there has been a reasonable opportunity or time for restoring it after being aware of its being down, or for learning of its being down and restoring it, the company will not be liable; and a somewhat similar doctrine is applicable where bars or gates at a crossing are left open without the company's consent or fault. *Harrington v. Railroad Co.*, 71 Mo. 384; 2 Am. & Eng. R. Cas. 652; *Clardy v. Railway Co.*, 73 Mo. 576; 7 Am. & Eng. R. Cas. 555; *Case v. Railroad Co.*, 75 Mo. 668; 13 Am. & Eng. R. Cas. 564; *Walters v. Railway Co.*, 78 Mo. 617; 19 Am. & Eng. R. Cas. 662; *Rutledge v. Railroad Co.*, *Id.* 286; 19 Am. & Eng. R. Cas. 669; *Perry v. Railway Co.*, 36 Iowa, 102; *Aylesworth v. Railroad Co.*, 30 Iowa, 459; *Henderson v. Railroad Co.*, 39 Iowa, 220; *Davis v. Railroad Co.*, 40 Iowa, 292; *Munch v. Railroad Co.*, 29 Barb. 647; *Hodge v. Railroad Co.*, 27 Hun, 394; *Morrison v. Railroad Co.*, 32 Barb. 568; *Robinson v. Railway Co.*, 32 Mich. 322; *Railway Co. v. Eder*, 45 Mich. 329; *Railroad Co. v. Monroe*, 47 Mich. 152; *Lemon v. Railway Co.*, 59 Mich. 618; *Brown v. Railway Co.*, 21 Wis. 39; *Goddard v. Railway Co.*, 54 Wis. 548; *Railroad Co. v. Swearingen*, 47 Ill. 206; *Railroad Co. v. Saunders*, 85 Ill. 288, *Railway Co. v. Daniels*, 21 Ind. 256; *Railroad Co. v. Truitt*, 24 Ind. 162.

Here, however, there is no such case; on the contrary, the gap is one which was not only authorized by the company, but also used solely for a purpose, or to an end, that was essential to the operation of the road. Grant that it is said that the parties who handled the wood owned the wood racks, still it is clear that they were furnishing the wood, and hauling it in through the gap, and depositing it on the racks close to the track, under contract with the company and for its use, and it is apparent from the testimony of the company's employes that the company regarded the keeping of the bars up as a part of the company's duty, and, moreover, was aware that it could not rely on the men engaged in hauling the wood to perform that duty. The leaving of the bars down by these persons, or any of them, while engaged in hauling wood, was not the act of a mere stranger to the company, within the meaning of the cases cited above, but was an act done by

those who, as between the company and the public, were acting for the company; and the only reasonable inference to be drawn from the testimony is that the bars were left down by these parties the afternoon before the accident, and while hauling wood for the company; and there is no proof, nor can it be assumed, that they were ever put up after being seen by such agents to be down.

Under a statute of New York requiring railroad corporations to erect and maintain fences on both sides of their roads, no exception being made or permission given thereby for openings or gates for the use of the corporation or its customers, or the public generally, but only for the use of adjoining proprietors, it was decided in *Spinner v. Railroad Co.*, 67 N. Y. 153, that if the company permits or acquiesces in the use in its business, by its customers, of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default. The gate through which the plaintiff's cattle entered had for several years been used almost daily in the business of loading and unloading freight, vehicles delivering or taking goods passing in or out thereat; and in this business the company's servants had helped. In consequence, the gate was left open at the close of the day's business, and would be closed in the evening or at midnight by defendant's servants. The adjoining proprietor, for whose use the gate was originally erected, had not used it for six weeks before the accident, and had no knowledge of its use for his purposes on the preceding day. The cattle had escaped from plaintiff's inclosure in the nighttime onto the highway, and thence through the gate, and had got onto the railroad, and been killed or injured by a passing train. It was held that the evidence was sufficient to authorize an inference by the jury that the gate was open by reason of its use by defendant's customers during the day, or some day shortly prior; that the defendant had sufficient notice that the gateway had been diverted from its original purpose to a common passageway for its customers, and that it was often left open in consequence thereof; that the opening of it at all, by its assent or acquiescence, was in contravention of the statute; and that, if such use of the gate was not of itself sufficient to charge defendant, it was bound to see that when the use of it for the day was over it was well closed, and that for a neglect of this duty it was liable.

It is said in the opinion that when the farm gate is put to the use of the company or its customers, or made subservient to the business of the former, it is not a farm gate *pro tanto*, but is as a panel in the fence taken down by it or them, and, if left open, it is as a panel left fallen down; that it is bound

to keep that gate also in good repair,—not simply in sound material condition, but in such state as is required for a division fence, or as will turn away cattle from its track. If it permits, invites, and shares in such a use of the gateway as, to its knowledge or notice, results in the gate not serving the end of a fence, it fails in its duty. In effect, the gate is then no longer merely a gate at a farm crossing, for the use, alone, of an adjoining proprietor, but it has become the fence of the defendant. When it has knowledge or notice that the gate is customarily left open, or when, from the manner of the use of it, it has notice that such result is likely to happen, it is in statutory default if it does not see to the closing of it when the use of it is over for the day or other short period.

In *Railroad Company v. Swift*, 42 Ind. 119, the railroad had been fenced, but a panel of the fence had been cut out and made into the form of a gate, but not hung on hinges, and the opening was used by persons hauling wood and placing it near the railroad track, and this was done with the consent of the railroad company, or without objection from it, a subtenant of the plaintiff being one of the persons hauling wood; and, while he was so hauling, the gate was so set up that hogs of the plaintiff passed through the opening and upon the railroad, and were killed, and it was held that these facts did not show such negligence on the part of the plaintiff as to prevent his recovery, and that, if a railroad company allow an opening to be made in the fence inclosing its road and left insecure, it cannot be said that the road is securely fenced, and if animals pass through the same and upon the railroad, and are killed, the company is liable without proof of negligence on the part of the company. See, also, *Laude v. Railway Co.*, 33 Wis. 640; *Railroad Co. v. Logan*, 19 Ind. 294; *Railroad Co. v. Arnold*, 47 Ill. 173; *Railway Co. v. Harris*, 54 Ill. 528.

It could not be inferred at all reasonably, from the evidence, that the bars were left down by any one but the men who were shown to have been engaged in hauling wood; and, this being so, and those men, according to the principles governing the case, not being strangers to the company, there was no error in refusing the instruction. Considering the character of the testimony just referred to, the instruction was more or less irrelevant, and was calculated to mislead the jury, if not accompanied by a qualification excluding the idea that those hauling wood were not such strangers. The judge, among other instructions, told the jury that a railroad company is not liable for horses killed by its trains unless it was negligent, or failed to erect and maintain proper fences and stock guards, and that the burden was

Liability of
company.

upon the plaintiff to show that the company did not maintain fences sufficient to exclude and turn live stock.

The declaration is sufficient against the objection that it does not show that the damage was caused by a failure to erect or maintain said fences or stock-guards, and the motion in arrest of judgment was properly denied; and the other assignments of error, in so far as they merit notice, are disposed of by what has been said.

The judgment is affirmed.

Claims against Railroad Companies for Killing Stock.—Sufficiency of Claim for Double Damages under Iowa Statute—Designation of Company by Initials.—In *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 28, 1895), 61 N. W. Rep. 1058, which was an action against a railroad company for the killing of stock upon its track, and in which a claim was made for double damages, it appeared that the notice given under a statute which permitted such damages, was addressed "to the C., R. I. & P. R. Co.," which were the initial letters of the name of the defendant company, and that the notice and the accompanying affidavit stated that the stock was killed on the track of a railroad commonly known as "the Chicago, Rock Island & Pacific Railroad, running from Keokuk, Iowa, to Des Moines, Iowa," and it was held that parol evidence was properly admitted to show that the company was usually known by such initials, and that the notice was a sufficient notification to the defendant, the Chicago, Rock Island & Pacific Railway Co.

Sufficiency of Notice of Application for Appointment of Appraisers under Kentucky Statute—Failure of Notice to Fix Time for Application or to Contain Address of Company—Non-appearance of Company on Application.—In *Newport News & M. V. R. R. Co. v. Thomas* (Ky., Feb. 12, 1895), 29 S. W. Rep. 437, it was held that notice to a railroad company required by statute to be given by the owner of stock killed for the appointment of appraisers, was insufficient, where it failed to fix the time when the application for the appointment was to be made, was not addressed to the company sought to be charged with the killing, and it did not appear that the company made any appearance on the application for the appointment of appraisers.

Object of Florida Statute Requiring Presentation of Claim to Authorize Recovery of Attorney's Fees and 50% Interest on Damages—Tender of Compensation by Company as Affecting Right of Recovery.—In *Pensacola & A. R. Co. v. Braxton* (Fla., Nov. 20, 1894), 16 So. Rep. 317, it was held that the purpose of section 2 of chapter 3742, Laws, approved May 13, 1887, making provision for the recovery of damages for cattle killed by railroad companies in cases where they have failed to keep their roadways fenced and supplied with cattle-guard, and for the recovery of interest on the damages at the rate of 50 per cent per annum and attorney's fees, in requiring the plaintiff to give a written notice of his claim prior to the commencement of suit, is to afford the defendant company an opportunity to investigate the justness of the claim, and to permit it, without litigation, either to pay it in full as presented, or to make tender of, or an offer to pay, such an amount thereof as it deems to be just and reasonable. If, after such tender or offer to pay, the plaintiff sues and recovers no more damages than he was tendered or offered before suit, then he cannot recover either the special statutory interest, or any attorney's fee, or any costs; but, on the contrary, in such a case, the defendant is entitled to judgment in its favor for all of its

reasonable costs, to be deducted from the amount of damages found for the plaintiff.

It was also held herein, that in order to relieve itself of the liability to a recovery of the special statutory interest and of attorney's fees and of the costs of suit in such cases, the defendant company must have, before suit brought, made a tender or offer of payment to the plaintiff of some amount in settlement of his claim as presented in the written notice thereof, that the amount thus tendered or offered must be nothing less than the amount afterwards awarded by the judge or jury as the damage actually sustained, and if the plaintiff at the trial recovers any greater amount as his damages than was offered or tendered before suit, then he is entitled to the special statutory interest and attorney's fees and costs; and this whether the sum awarded as damages be equal to or less than the amount claimed in the prerequisite written notice.

It was further held, that if the plaintiff in such cases gives the required written notice of his claim, and the defendant company ignores it, and makes no tender or offer of any sum in settlement thereof before suit brought, then, under this statute, if the plaintiff sues and recovers any damage whatever, he is entitled, along with it, to the special statutory interest and to attorney's fees and costs.

Right of Claimant to Retain Money Paid him by Mistake of the Company.—In *Pensacola & A. R. Co. v. Braxton* (Fla., Nov. 20, 1894), 16 So. Rep. 317, it appeared that plaintiff had a just and legal claim against a railroad company for an ox wrongfully killed by it, amounting to \$25, and of which he had notified the company, demanding payment thereof, that he received a voucher for \$22.50 without fraud upon his part, but in good faith, believing it was his, and that it was given him in payment of his claim, and in that belief appropriated it, and it further appeared that his claim never was settled otherwise, and the court said that, under the circumstances, it did not think that the retention of the money by him necessarily involved any smartings of good conscience. The court further said: "The law seems to be settled that money paid under a mistake of facts cannot be reclaimed, where the plaintiff has derived a substantial benefit from the payment, nor where the defendant received it in good faith in satisfaction of an equitable claim, nor where it was due in honor and conscience. 2 Greenl. Ev. (15th Ed.) § 128; *Norton v. Marden*, 15 Me. 45; *Moore v. Eddowes*, 2 Adol. & E. 133; *Glenn v. Shannon*, 12 S. C. 570; *Foster v. Kirby*, 31 Mo. 496; *Brisbane v. Dacres*, 5 Taunt. 143-163, 14 Eng. Rev. Rep. 718; *Farmer v. Arundel*, 2 W. Bl. 824. The right to recovery in such cases turns upon the question as to whether the party receiving the money paid by mistake can, in good conscience, retain it."

Admissibility of Secondary Evidence of Contents of Notice of Claim Presented under Florida Statute.—In *Pensacola & A. R. Co. v. Braxton* (Fla., Nov. 20, 1894), 16 So. Rep. 317, the syllabus by the court is as follows: The general rule is that, where it is desired to prove the contents of a written instrument that is in the possession of the adverse litigant, the party desiring such proof, before he can introduce secondary evidence of its contents, by copy or otherwise, must lay a foundation for the introduction of such secondary evidence by giving to such adverse litigant possessor of the instrument, or to his attorney, a regular notice to produce the original. This general rule, however, is subject to three exceptions where such notice to produce is not necessary as a preliminary foundation to the introduction of such secondary evidence, which exceptions are as follows: First, where the instrument to be produced and that to be proved are duplicate originals; secondly, where the instrument to be produced is itself a notice,—such as a notice to quit, or notice of the dishonor of a bill of exchange, etc.; thirdly, where, from the nature of the action, the defendant has notice that

the plaintiff intends to charge him with possession of the instrument,—as, for example, in trover for a bill of exchange. *Held*, that the written notice of claims for stock killed by railroads, required by our statute to be given, belong to that class of notices where no notice to produce the original served on the defendant is necessary as a predicate for the introduction of secondary evidence of its contents.

BATES

v.

FREMONT, ELKHORN & MISSOURI VALLEY R. CO.

(*South Dakota Supreme Court, Dec. 9, 1898.*)

Action Against Railroad Company for Killing Stock—Sufficiency of Complaint—Averment of Negligence.—Section 5501, Comp. Laws, makes proof of the killing of stock by a railroad company *prima-facie* evidence of the negligence of the company, and an averment, in the complaint in such an action, that the stock were so killed within the terms of the statute, is a sufficient averment of negligence on the part of the company.

Same—Province of Court and Jury.—Upon the trial, if the evidence leave the facts undisputed, and they are such that different conclusions or inferences could not reasonably be drawn from them, it becomes the duty of the court to declare their legal effect; but if the facts are in dispute, or, if undisputed, they are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury.

Same—Conflicting Evidence as to Signals.—Evidence of defendant's witnesses that the whistle was blown and the bell rung at the usual distance from the crossing, and that of plaintiff's witnesses that they heard no whistle or bell, though sufficiently near to hear, and watching and listening for the same, creates a conflict as to the fact of the bell being rung or the whistle blown, which question, if material, should be submitted to the jury.

Same—Contributory Negligence.—Where the plaintiff was driving a number of loose horses and mules along the highway in the afternoon, and towards a railroad crossing, the track for some distance being obscured by an intervening embankment, knowing that a train was due to pass during the afternoon, but not at what hour, the fact that he did not ride ahead, and hold his stock back until he could and did go to the track and ascertain whether or not a train was coming, is a fact tending to show contributory negligence, and as such should go to the jury with all the circumstances of the case, but it does not establish contributory negligence as matter of law. CORSON, J., *dissenting*.

APPEAL from Meade county circuit court.

J. W. Fowler, for appellant.

M. McMahon, for respondent.

KELLAM, J.—This is an action to recover the value of two mules conceded to have been killed by defendant's train at a point where defendant's track crosses the public highway. The plaintiff had judgment, and, after denial of a motion for a new trial, defendant appealed. Case stated.

In his oral argument, appellant contended that the complaint itself was fatally defective, in that it did not expressly allege negligence on the part of the defendant in causing the injury complained of. Sufficiency of complaint. Section 5501, Comp. Laws, makes proof of the killing *prima-facie* evidence of the negligence of the company, so that, when the killing is established, the negligence is also sufficiently proved, until the defendant, by evidence, disproves the *prima-facie* case of negligence so made.

The general rule is that it is only necessary to plead what, if proved, will entitle the pleader to the relief he asks; but proving the killing also proves the negligence, and these two elements constitute the cause of action or claim for relief. It seems to be logical that, when the statute attaches a definite effect to a fact, pleading of that fact is also pleading its legal effect. Such is the view of the Iowa court, and it is so held in several cases. See *Engle v. Railway Co.* (Iowa), 37 N. W. 6, in which it is said that the allegation of negligence is redundant. See, also, *Rose v. Railway Co.*, 72 Iowa, 625, where the only question was as to the necessity of such averment. The court held it unnecessary. In *Seska v. Railway Co.*, 77 Iowa, 137, the same rule was again declared. In *Railway Co. v. Brown*, 49 Ark. 253, the court said: "The objection that negligence on the part of the company is not averred is not well taken. It was shown that the stock was injured by the company's train, and that the statute makes *prima-facie* evidence of negligence. A legal conclusion need not be alleged." *Railway Co. v. Snaveley*, 47 Kan. 637, was an action for damages by fire under a statute making proof of the setting out of the fire by the company *prima-facie* evidence of negligence. Upon the question now under consideration the court said: "Whenever sufficient facts are alleged in the plaintiff's pleading which would, if proved, make out a *prima-facie* case against the railroad company, sufficient facts are alleged to constitute a cause of action against the railroad company. It might be better to plead negligence expressly; but, when a plaintiff has alleged all the facts which he is required to prove to make out a *prima-facie* case, it would seem that his pleading ought to be held good." See, also, *Hindman v. Navigation Co.*, 17 Oregon, 614, 38 Am. & Eng. R. Cas. 370. We think the omission to expressly charge negligence was not a fatal defect in the complaint.

Upon the trial the plaintiff proved the killing of the mules and their value. He also testified that at the time of the accident he was driving these mules, with other stock, along the highway; that he did not know at what time the train passed, only that it was in the afternoon; that shortly before he reached the crossing he "slacked up" to see if he could hear or see any train, looked two or three times each way, and could not see or hear any. He then went forward with his stock, and when close to the track, and about to cross, he for the first time heard the engine whistle, but not in time to prevent the stock attempting to cross. He says, "No man on earth could have then stopped them." In thus attempting to cross the track the two mules were killed.

With this testimony the plaintiff rested. Defendant moved the court to direct a verdict in its favor, which was refused, but the refusal is not assigned as error.

The defendant then introduced as witnesses the engineer and fireman in charge of the engine. Their testimony was that, before crossing the highway where the accident occurred, the track ran for some distance through a deep cut, which obstructed the view between the track and the highway where the defendant was driving his mules, the track and the highway crossing each other diagonally; that this cut so obstructed the view between the track and the highway up to a hundred feet of the crossing; that at the usual distance from the crossing the whistle was blown and the bell rung, and that on emerging from the cut, and as soon as the stock were discovered near the track, the whistle was again successively blown, and the air-brakes applied, and every precaution taken to prevent the accident.

A witness who was a passenger on the train also testified that the whistle was blown for the crossing, and afterwards the "danger-whistle" was blown. As against this testimony, and in rebuttal of it, a witness for the plaintiff testified that he was on the south side of the track, where he could see both the track and highway; that he was from a hundred to a hundred and twenty rods from the crossing, on the opposite side of the track from plaintiff and his stock; that he saw both the stock and the train approaching the crossing, and, apprehending an accident, gave particular attention to what he saw and heard; that he listened to see if they would blow the whistle; that he heard no whistle until "they blew the danger-signal right close to the crossing." Upon this evidence the defendant moved the court to direct a verdict for the defendant, for the reason "that there is no evidence of negligence on the part of the defendant offered by the plaintiff in rebuttal of the evidence of defendant," and that the

statutory presumption of negligence on account of the killing was entirely overcome by the evidence; and the refusal of the court to so direct is the root of all the error assigned.

The ground of defendant's liability, if liable at all, was negligence. When the killing was proved, a *prima-facie* case of negligence was proved. Comp. Laws, § 4501. The defendant might then present evidence to show its freedom from carelessness or negligence, and thus ^{Province of} meet and disprove the presumption that under the ^{court and jury.} statute, follows the unexplained fact of killing. It might show in a case like this, as it did attempt to do, that the whistle was sounded and the bell rung at a proper distance from the crossing, that those in charge of the engine kept a careful lookout ahead, and that, as soon as the obstruction was discovered, every effort was made to prevent the accident, both by frightening the stock from the track and by stopping the train; or it might show that the carelessness of the plaintiff, and not its own, was the proximate cause of the injury. Then, as in other cases, the plaintiff may introduce rebutting testimony, denying, explaining, or qualifying the evidence offered by defendant. If this testimony, when in, leaves the facts undisputed, and they are such that different conclusions or inferences could not reasonably be drawn from them, it becomes the duty of the court to declare their legal effect; but if the facts are in dispute, or, if undisputed, they are such that different impartial minds might fairly draw different conclusions from them, they should be submitted to the jury. *Williams v. Railroad Co.*, 3 Dak. 168, 11 Am. & Eng. R. Cas. 421; *Mares v. Same Defendant*, 3 Dak. 336, 17 Am. & Eng. R. Cas. 620; *Railroad Co. v. Van Steinburg*, 17 Mich. 122; *Railroad Co. v. Stout*, 17 Wall. 657; *Norton v. Ittner*, 56 Mo. 351; *Abbett v. Railway Co.*, 30 Minn. 482; *Totten v. Railroad Co.*, 10 N. Y. Supp. 572. See, also, 11 Am. & Eng. Enc. Law, p. 453 *et seq.*; 2 Thomp. Neg. p. 1236.

Applying the principle of the cases cited to this case, I think there was no error in the refusal of the trial court to direct a verdict for the defendant on the ground that there was no evidence from which the jury might find negligence on the part of the defendant.

It is reasonably plain that, if the jury gave full credit to the testimony of defendant's witnesses, the verdict should have been for the company; but they were not obliged to do so. The plaintiff had testified that he had heard no whistle or bell until the engine was close ^{Signals.} to the crossing. He says: "It was close on me when it whistled; not further off than across this room." The wit-

ness Raymond testified that he was from a hundred to a hundred and twenty rods from the crossing, and saw both train and stock approaching the crossing and knew that, unless one or the other stopped, "there was going to be a collision;" that he "was listening, wondering whether or no they would blow the whistle;" that he saw the train "on the upper end of the cut, coming this way;" that he "heard no whistle until they blowed the danger-signal right close to the crossing."

Both the engineer and fireman had testified that the whistle was blown and the bell rung the usual distance from the crossing, which they said was about 80 rods. The fireman, however, testified that the train was in the cut before the whistle was blown.

The jury might have believed that the witness Raymond, whose attention would be naturally fixed, as he says it was, by his apprehension of an impending accident, would be more liable to be correct as to the blowing of the whistle than either the engineer or the fireman, to whom it was an occurrence so frequently repeated that, in the absence of unusual circumstances to fix their attention upon it at the time, it would naturally have left no distinct impression on their memory. It is not always true that positive testimony must prevail over negative. Surrounding circumstances may greatly affect the comparative value of each. This testimony of this witness as to his nearness to the train, that the day was clear and still, that he was attentively watching and listening to see whether or no they would blow the whistle," and that he did not hear it, clearly presented a conflict with the evidence of defendant's witnesses that the whistle was blown, and made a question for the jury. If they believed the defendant's witnesses were mistaken as to the blowing of the whistle and the ringing of the bell, and that no whistle was blown or bell rung until the danger was too imminent to be avoided, and that such failure to give notice of their approach was the cause of the accident, and that plaintiff was not negligent, then they might have found for the plaintiff. We think that, within the latitude of judgment and inference which a jury is entitled to exercise, they might have found either way.

Appellant further contends that the plaintiff himself was guilty of such contributory negligence as would prevent his recovery. We think this question, like that of the negligence of the defendant, was, upon the evidence a question for the jury. The plaintiff had testified that he did not know at what time the train was due or usually passed the place of the accident, only that it came along during the afternoon; that before he reached

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negligence.

the crossing he "slacked up," and listened and looked but heard or saw no train; that he "slacked up on a walk on purpose to watch and hear." It was in the daytime, and there was no wind or storm to interfere with his hearing an approaching train. On one side of the highway the track runs through a cut to within a hundred feet of the crossing, whose bank obstructed the view between the highway where the plaintiff was and the track. Appellant contends that respondent should have gone forward to the track, and thus ascertained whether or not a train was approaching, and that he was guilty of negligence in not doing so. The jury might have so found as a matter of fact, under all the circumstances, but we do not think the court could have so ruled as a matter of law. There is no arbitrary, inelastic rule regulating what a person on the highway approaching a railroad crossing shall do to avoid the imputation of negligence.

In *Kellogg v. Railroad Co.*, 79 N. Y. 76, where the claim of contributory negligence on the part of the deceased was made, the court said: "Under all the circumstances surrounding the accident, we think it was for the jury to determine whether he exercised that care which the law required of him. He could probably have avoided the accident by stopping before he passed upon the track; but that is a degree of care not usual, even with even prudent men. * * * There may be cases where a traveller ought to do so, and, if he omits to do so, it would be one of the facts, with all the others, to be submitted to the jury." See, also, *Tyler v. Railroad Co.*, 137 Mass. 238, 19 Am. & Eng. R. Cas. 296; *Totten v. Railroad Co.*, *supra*; *Railroad Co. v. Crawford*, 24 Ohio St. 631; *Railroad Co. v. Van Steinburg*, *supra*; *Hahn v. Railroad Co.*, 78 Wis. 396. See, further, *Shear & R. Neg.* § 477, note, where it is stated that the great weight of authority is in favor of the rule that it is for the jury to decide whether, under the circumstances of any particular case, failure "to look and listen" is such contributory negligence as will defeat a recovery.

But in this case the plaintiff did slacken his horse "to a walk," and "walked quite a little ways" to see if he "could see or hear any train." He says he could not, and "thought the crossing safe." It will be remembered that plaintiff was driving a bunch of loose horses and mules along the highway. He says they were strung out before him, and going on a trot. It does not appear whether they were going at that pace of their own accord, or he was urging them. That, for some distance back from the crossing, but how far we are unable to tell from the evidence, he could not, on account of the embankment, see the train in the direction from which it was coming, without going clear to the track. To do this he

must, if he could, have ridden ahead of the horses and mules he was driving, and held them back until he could go to the track and make the observation. Perhaps he should have done this. We think the evidence tends to show negligence on his part, but does not establish it so conclusively as to justify the court in so declaring as a matter of law.

We think the correct rule for this case is announced in *Hoyt v. City of Hudson*, 41 Wis. 112: "If such negligence conclusively appears, the court will nonsuit the plaintiff, or direct the jury to find for the defendant. If the evidence only tends to show such contributory negligence, the question must go the jury, to be determined, like any other question of fact, upon a preponderance of the evidence."

Possibly the judges of this court, from a simple reading of the evidence, might have reached a different conclusion, but the trial jury had advantages superior to ours, growing out of a direct contact with the witnesses themselves. Added to this, the trial court, with the same advantages for judging of the candor and fairness and intelligence of the witnesses, and with the impression which the evidence made upon him still fresh in his mind, refused to set aside the verdict; and, while we are not entirely satisfied that upon the evidence the plaintiff should have recovered, we are of the opinion that this court could not disturb the verdict without violating well-established rules of appellate practice.

The judgment of the circuit court is affirmed.

BENNETT, J., concurs.

CORSON, J. (dissenting).—I am compelled to dissent from the views expressed by a majority of the court, and I will briefly state my reasons for such dissent. I am of the opinion that the evidence of the plaintiff on the trial of this case established the fact that he was guilty of such contributory negligence as would, as a matter of law, preclude him from recovering in this action.

I fully agree with the rule laid down by Mr. Justice KELLAM in the majority opinion, that when the facts are disputed, or, if not disputed, they are such that different minds might draw different conclusions therefrom, they must be submitted to the jury; but, in my view of this case, the facts are not only undisputed, but are such that only one conclusion can be fairly drawn from them. It appears from the undisputed evidence that the train which caused the injury was the south-bound passenger train, and before reaching the crossing it passed through a cut for about 60 rods, terminating about 100 feet northerly of the crossing; that the train, while in the cut,

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opinion.

could not be seen by persons passing southerly along the highway until they were within a short distance of the crossing. The plaintiff was driving his loose stock along the highway in a southerly direction. With these observations as to the relative position of the railroad track and highway, and the obstruction to the view of a train while in the cut from the highway, we will proceed to examine the testimony of the plaintiff as to the manner in which he approached the track and attempted to cross it. His testimony is as follows: "Before I got to the crossing, I slacked up on a walk, to see if I could see or hear any train, and I could not. Walked quite a little ways, and thought the crossing safe, and the mules and horses were trotting, though they were loose, and I kept up with them; and two or three times I looked both ways. Then, before I got to the crossing, looked up, and did not know why I could not get over. The first thing I knew, the train was coming down atop of me. I looked first, to head them off if I could, and I saw the head of them was within a few feet of the track,—maybe five or six feet. I saw it was impossible to save them. I did not want to stand here and see them killed, so I thought I would get them over the track. I think a part of them had got through, and they had got over, before I could get to them, so I done all I could to get them over. * * * This was about April 5, 1889. I was driving the mules from the north; coming this way, and driving them across the public crossing. I don't know about the train-time. The train generally came along in the afternoon. Of course, I don't know the time it did come, but I slacked up on a walk on purpose to watch and hear. I was not posted as to the exact time the train ran. I knew there was a public crossing over the railroad at that point. I heard the train whistle, but it got up close to me; would have been onto me anyway. I took out my blacksnake and whipped—attempted to whip—the mules across this crossing. The head one was just about stepping onto the track when I heard it, and the others were strung out behind her. I had five or six head strung out ahead of me. I knew there was a crossing there, because I had been up and down that road. I had passed on that road before."

• It will be observed that the plaintiff says he "slacked up and looked and listened" at some point, but at what point does not fully appear; but it was evidently quite a distance from the crossing, as he says he "walked quite a little way," and then kept up with the stock, which was trotting; that while thus trotting along with the stock, directly towards the crossing, he looked both ways two or three times, and before he got to the crossing he looked up, and did not see why he

could not get over, and, before he got over, the train passed, and two of his mules were killed. He admits that he knew the train passed south in the afternoon, though the exact time he did not know, and that he was acquainted with the crossing, having passed over the road before. The plaintiff does not say or claim that he stopped immediately before crossing and "looked and listened," or that he took any precautions, immediately before attempting to cross, to ascertain whether or not he could do so safely, except, as he trotted along with the horses and mules, he looked both ways. But, as we have seen, in looking in the direction from which a train might be expected, his view was obstructed by the intervening bank of earth between the highway and track. He does not say that he listened, but, had he done so, it would probably have been useless, as the noise made by his trotting mules and horses would have prevented his hearing the noise of the train.

"The rule requiring one about to cross the tracks of a railroad company to stop, look, and listen for an approaching train is a clear and certain rule of duty, and a failure to observe it is more than evidence of negligence; it is negligence itself." Headnote in case of *Greenwood v. Railroad Co.*, 124 Pa. St. 572. And Chief Justice PAXSON, in delivering the opinion of the court in that case, says: "If the rule to stop, look, and listen were always observed, an accident at crossings, now so frequent, would rarely occur, whether in town or country. * * * The rule itself is so valuable, is sustained by such abundant authority, and is, moreover founded upon such excellent common-sense reasons, that we will neither depart from it nor allow it to be undermined by exceptions. It is a clear and certain rule of duty, and a departure from it is more than evidence of negligence; it is negligence *per se*." By this rule it is evidently meant that the party "must stop, look, and listen" at a point near the railroad track, and immediately before attempting to cross, in all cases where from any cause the view of the track is obstructed, whether such obstruction be permanent or temporary. This is well illustrated in *Haas v. Railroad Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

In that case the plaintiff's intestate stopped about three rods before reaching the crossing, and then drove on a brisk trot from that point to the track, in crossing which he was struck by the engine, and killed. The court below directed a verdict for the defendant. COOLEY, J., in delivering the opinion of the court affirming the judgment, said: "To excuse this we are told that the crossing was peculiarly exposed to danger because of the banks on either side of the approach, and that it was the duty of the railroad company, because of this, to observe extraordinary precautions. We may concede this,

but it does not aid the plaintiff. The peculiar risks of the crossing imposed upon the decedent the duty of special caution also; and, as he knew that a regular train was due at the crossing at about that time, he was under the highest possible obligation to observe such precautions as would be needful to avoid a collision. *Railroad Co. v. Beale*, 73 Pa. St. 504.

We may concede that the railroad company failed to sound the bell; but this did not relieve the decedent from the duty of taking ordinary precautions for his own safety (*Railroad Co. v. Houston*, 95 U. S. 697, 702); and what ordinary prudence would demand must be determined on a view of all the circumstances. It is vain to urge or to pretend that ordinary precautions were made use of in this case. To move forward briskly, as the decedent did, from a point whence an approaching train would not be seen, at a time when it was known by him that a train was due, and not to pause until the train was encountered, was so far from being ordinary prudence that it approached more nearly to absolute recklessness."

In *Fletcher v. Railroad Co.*, 149 Mass. 127, the supreme court of Massachusetts lays down the following rule: "As a general rule, a person is not in the exercise of due care who attempts to cross a railroad track without taking reasonable precaution to assure himself, by actual observation, that there is no danger from approaching trains."

Again, the court says: "The rule as to looking for trains when about to cross a railroad track, laid down in the cases we have cited, prevails in nearly all the courts in this country;" and the court cites approvingly the following from the decision in *McCrory v. Railroad Co.*, 31 Fed. Rep. 531: "The law lays it down clearly that a man must look and listen; and if, by looking and listening he could ascertain the approach of a train, and fails to do so, he is guilty of contributory negligence and cannot recover." See, also, *Railway Co. v. Grames* (Ind.), 34 N. E. 613; *Railway Co. v. Butler*, 103 Ind. 31, 23 Am. & Eng. R. Cas. 262; *Railroad Co. v. Beale*, 73 Pa. St. 504; *Seefeld v. Railway Co.*, 70 Wis. 216, 32 Am. & Eng. R. Cas. 109; *Marty v. Railway Co.*, 38 Minn. 108, 32 Am. & Eng. R. Cas. 107; *Chase v. Railroad Co.*, 78 Me. 346; *Heaney v. Railroad Co.*, 112 N. Y. 122, 37 Am. & Eng. R. Cas. 529; *Railway Co. v. Stommel*, 126 Ind. 35; *Railroad Co. v. Righter*, 42 N. J. Law, 180, 2 Am. & Eng. R. Cas. 220; *Henze v. Railroad Co.*, 71 Mo. 636, 2 Am. & Eng. R. Cas. 212; *Turner v. Railroad Co.* 74 Mo. 602, 6 Am. & Eng. R. Cas. 38; *Wilds v. Railroad Co.*, 24 N. Y. 430; *Griffin v. Railway Co.*, 68 Iowa, 638.

In the case at bar the plaintiff knew, as all persons know who approach a railroad crossing, that it is a place of danger,

and that this crossing was especially so at that time of day, when the south-bound train was liable to pass at any moment, and still more especially dangerous at that point, as the train, before reaching the crossing, was for a time hidden from his view in the cut. The care to be exercised by one in crossing a railroad track must be commensurate with the danger. "The greater the danger, the greater the precaution required of him. He must not only do what an ordinarily prudent man would do under like circumstances, but he must exercise such care and diligence as are commensurate with the danger that confronts him." *Railway Co. v. Grames, supra.*

Some importance seems to be attached in the majority opinion to the fact that the plaintiff was embarrassed by driving loose stock, over which he had not such immediate control that he would have had had they been led, or harnessed to a vehicle. But this fact cannot change the rule of law. The fact that he was so embarrassed imposed upon him greater vigilance and caution. The defendant was not responsible, and ought not to suffer because of the embarrassed position in which the plaintiff had placed himself. It was not caused by any act of the defendant. I am of the opinion, therefore, that plaintiff's loss was caused by his own negligence, and want of that care which a prudent man ordinarily exercises, and which the law requires of one about to cross a railroad track to exercise.

As before stated, every one is presumed to know and realize that a railroad crossing, under the most favorable circumstances, is a place of danger, as not only regular trains may not pass on time, but extra trains and specials may pass along at any moment. The rule, therefore, that a person who desires to cross the track at a highway crossing must, for his own safety and for the safety of his property, when from any cause his view of the track is obstructed, immediately before crossing, "stop, look, and listen," is a wise and salutary one, and a person who fails to observe it, and chooses to encounter the peril without taking the precaution the law requires, must assume the risk. Who, upon reading the plaintiff's evidence, can for a moment doubt that had he, immediately before attempting to cross, or permit his stock to cross, the track, stopped, looked, and listened, he would have seen or heard the train then approaching the crossing, and thus avoided the accident that occurred? The law makes it his duty to do so, and, failing to perform a plain duty thus imposed, he cannot recover. The judgment should, in my opinion, be reversed.

Killing Live Stock—Contributory Negligence of Owner.—See *McCoy v. Southern Pacific R. Co.* (Cal.), 56 Am. & Eng. R. Cas. 132, and note 135;

Adams v. Atchison, Topeka & Santa Fe R. Co. (Kan.), 49 Am. & Eng. R. Cas. 579, and note 583.

Evidence in Actions for Killing Live Stock—Presumption of Negligence—Evidence—Burden of Proof.—See *Hodgins v. Minneapolis, St. Paul & Sault Ste Marie R. Co. (N. Dak.)*, 56 Am. & Eng. R. Cas. 137, and note 142; *McMaster v. Montana Union R. Co. (Mont.)*, 56 Am. & Eng. R. Cas. 195, and note 221.

Duty of Company to give Warning Signals—Purposes of Statute Requiring Sounding of Bell and Whistle.—In *Toudy v. Norfolk & W. R. Co. (W. Va., Feb. 3, 1894)*, 18 S. E. Rep. 896, it was held that the statutory requirement of blowing the whistle or ringing the bell 60 rods before reaching a crossing is intended to warn persons who are about to use the crossing in passing over the public road, and not for the purpose of preventing dumb animals from going upon the crossing. *Citing* *Improvement Co. v. Stead*, 95 U. S. 161; *Fisher v. Railroad Co.*, 126 Pa. St. 293; *Hawker v. Railroad Co.*, 15 W. Va. 628; *Flattes v. Railroad Co.*, 35 Iowa, 191; *Maynard v. Railroad Co.*, 115 Mass. 458; *Railroad Co. v. Ballard*, 2 Metc. (Ky.), 177; *Needham v. Railroad Co.*, 37 Cal. 409.

Right of Recovery as Dependent on Injury Resulting from Failure to give Statutory Signals.—In *Hilliker-Krebs B. & M. Co. v. Birmingham R. & E. Co.*, 100 Ala. 424, it was held that a failure to comply with Code 1886, § 1144, which requires the whistle of an engine to be sounded, and its bell rung at least one-fourth of a mile before reaching a public crossing, and continuously until the crossing is passed, is not in every case an actionable wrong, since by section 1147, the penalty for such failure is a liability for all damages done to persons or to stock or other property "resulting from" such failure, and it is only where the injury results from the failure to comply with the statute that the action for damages can be maintained, and that this principle only extends to such injuries as are caused by the non-observance of such rules. *Citing* *Railroad Co. v. McAlpine*, 75 Ala. 113, 118, 22 Am. & Eng. R. Cas. 602; *Clements v. Railroad Co.*, 77 Ala. 533; *Railroad Co. v. Hembree*, 85 Ala. 481, 30 Am. & Eng. R. Cas. 300; *Railway Co. v. Hughes*, 87 Ala. 610, 39 Am. & Eng. R. Cas. 674; *Railroad Co. v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596.

Failure to give Signals as Contributing to Injury—Sufficiency of Evidence.—In *Hilliker-Krebs B. & M. Co. v. Birmingham R. & E. Co.*, 100 Ala. 424, the engineer and fireman of the defendant company testified that on the night of the killing of plaintiff's animals, a mist on the headlight obscured the transparency of the glass; that they were steadily looking ahead and saw the animals as soon as it was possible to discover them; that upon their discovery the engine was immediately reversed, and that the collision occurred before they had time to apply the brakes. They also testified that the train was going down grade, and that smoke from a coke-oven near by had settled on and obscured the track at the place of the injury, which was at a depression; and that the train was moving at about 10 miles an hour when the collision occurred, and could not have been stopped in time to have avoided the injury. In opposition to this, two passengers testified that the train was moving at about the rate of twenty miles an hour, that it had been raining, but that the rain had ceased; that if the engine had been reversed they would have felt the sensation, and that they felt no sensation until the train struck the animals, which caused a violent shock and stoppage of the train, and it was held that if it was manifest that the failure to blow the whistle or ring the bell did not cause or contribute to the injury, there was no liability under a statute (Code 1886, §§ 1144, 1147), requiring persons in charge of an engine to sound the whistle or ring the bell within a specified distance from a public crossing, and imposing a liability for injury to stock resulting from such failure.

Actions Against Railroad Companies for Killing or Injuring Stock—Applicability of Foreign Statute of Limitations.—In *Louisville & N. R. Co. v. Pool* (Miss., Jan. 28, 1895), 16 So. Rep. 753, it was held that a statute (Code, § 2754), providing that "When a cause of action has accrued in some other state or in a foreign country, and by the law of such state or country, or of some other state or country where the defendant has resided before he resided in this state, an action thereon can not be maintained by reason of lapse of time, an action shall not be maintained here," has in view the case of a non-resident protected by the bar of the statute of limitations of the state or country in which he resided, against a cause of action there arising, who afterwards moves into the state, and cannot be availed of by a railroad company operating its line within the state, and in another state in an action for damages for the killing of stock in such other state. The court said: "Ordinarily, there will be no difficulty in pleading or applying the statute, for the plea of a natural person that during a certain period of time he was a resident of another state, *ex vi termini*, implies that during that time he was a non-resident here. But a corporation may, for many purposes, be resident in many states at one time; and it may be, and probably is, true that the defendant was operating its road both in this state and Alabama when, by the running of its cars in Alabama, it killed the plaintiff's cattle. Strangely enough, there is no evidence of this fact in the record. But we think the plaintiff's case is helped by the plea of the defendant, which fails to aver the fact of non-residence by it during the period pleaded as a bar. The plea is that the defendant was a resident of Alabama, which may be true. *Non constat* that it was not also resident in this state."

Sufficiency of Declaration—Alleging Negligent Operation of Train.—In *Jacksonville, T. & K. W. R. Co. v. Jones* (Fla., July 31, 1894), 15 So. Rep. 924, it was held, that a declaration alleging that it was the duty of a railroad company to use good care in running and managing its locomotives and trains, and, disregarding its duty in that respect, so negligently and carelessly ran and operated a locomotive and train of cars on a day mentioned, and in a designated town on the road, as to strike and kill a mule of plaintiff, stated a cause of action, and was good on demurrer.

It was further held that in such a case it is not necessary to set out in the declaration the facts constituting the negligence; but an allegation of sufficient facts causing the injury, and that they were negligently and carelessly done, will be sufficient.

Charging Negligent Failure to Fence.—In *Jacksonville, T. & K. W. R. Co. v. Prior* (Fla., July 16, 1894), 15 So. Rep. 760, it was held that a declaration against a railroad company, alleging that it was the duty of the company, under the act of 1887, c. 3742, to erect and maintain suitable fences on the sides of its railroad track, sufficient to exclude and turn live stock therefrom, and that the company failed to erect and maintain such fence at a point on the road not in a town or city or at a public road-crossing, and, by means of such neglect, plaintiff's cows, of certain value mentioned, strayed upon the track at a point not fenced, and were killed by a passing train of the company, stated a good cause of action.

Change of Issues by Amendment Charging Failure to Fence in Addition to Negligent Management of Train.—In *McCracken v. Chicago, R. I. & P. R. Co.* (Iowa, May 17, 1894), 58 N. W. Rep. 1085, which was an action for injury to live stock by the alleged negligence of a railroad company, the petition charged negligent management of the train which inflicted the injuries and was amended so as to charge that the injury occurred on the track east of the crossing, where defendant had a right to fence; that the railroad was not properly constructed, and not so connected with the cattle-guards as to prevent animals from going on the railroad track; and that it was not

properly fenced with cattle-guards at said point, but the charge that the injuries were caused by negligent management of the train remained without amendment, and the issues tended in the first count as amended were that the animals were injured east of the crossing, where defendant had a right to fence, and because of its failure to do so, or, if injured on the crossing, it was because of the negligent management of the train and it was held that there was no substantial change of the issues by these amendments that could have worked any surprise or prejudice to the defendant and that therefore there was no error in overruling motions to strike out the amendments.

Waiver of Defects in Petition—Failure to Charge Negligence on Part of Company.—In *Manwell v. Burlington, C. R. & N. R. Co.* (Iowa, Jan. 22, 1894), 57 N. W. Rep. 441, it was held that defects in a petition in an action for the killing of stock, which consist in the failure to show negligence on the part of the defendant company, will be deemed waived, where no objection has been taken to such defects by way of demurrer. *Following Brockert v. Railway Co.*, 82 Iowa, 370; *Linden v. Green*, 81 Iowa, 365.

Admission by Company of Killing and Value of Animal—Right to Open and Close Argument.—In *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, it was held that where in an action for the killing of stock, the defendant company admits the killing by its train, and the value of the animal killed, it assumes the burden of proof, and is entitled to open and close the argument.

Sufficiency of Proof of Identity of Animal Killed.—In *Kelly v. Oregon Short L. & U. N. R. Co.* (Idaho, Nov. 22, 1894), 38 Pac. Rep. 404, which was an action for the killing of a bull by a railroad train, the plaintiff described his animal as a four-year-old, half-breed, polled Angus bull, branded M. K. on the left side, and a piece cut out of his ear." Two other witnesses testified that the bull in question was that of plaintiff. One witness was quite positive, as the animal had run with his band of cattle up to within a few days of its killing. The other witness was equally positive, being well acquainted with the animal, and having seen and examined it a few hours after it was killed, and it was held that the evidence sufficiently established the identity of the animal, notwithstanding the negative statement of another witness that he found no brand upon it.

Necessity of Specific Proof of Killing at Place where Company is under Statutory Duty to Fence.—In *Croddy v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 5, 1894), 60 N. W. Rep. 214. In Iowa the statute (Code, § 1288), provides that "every corporation constructing or operating a railroad shall make proper cattle-guards where the same enters or leaves any improved or fenced land, and construct at all points where such railway crosses any public highway good, sufficient, and safe crossings and cattle-guards, * * * and any railway company neglecting or refusing to comply with the provisions of this section shall be liable for all damages sustained by reason of such neglect and refusal. And in order for the injured party to recover it shall only be necessary for him to prove such neglect or refusal." *Held*, that plaintiff must show that he was damaged by the defective crossing, and where the issue is as to whether an animal was killed upon the crossing or at a place where the railroad company had a right to fence, the plaintiff is required to show that the accident was upon the crossing, and not at some other place. *Citing Manwell v. Railway Co.*, 80 Iowa, 662, 45 Am. & Eng. R. Cas. 501; *Wall v. Railway Co.* (Iowa), 56 N. W. 436; *Ford v. Railway Co.* (Iowa), 59 N. W. 5.

Admissibility of Proof of Killing of other Stock at Same Locality.—In *Croddy v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 5, 1894), 60 N. W. Rep. 214, which was an action against a railroad company to recover for stock

killed at a crossing, it was held that proof of the killing of other stock at the same crossing prior to the accident in question was inadmissible. *Citing Hudson v. Railway Co.*, 59 Iowa, 581.

Admissibility of Non-expert Testimony as to Light thrown from Headlight.—In *St. Louis & S. F. R. Co. v. Thomason*, 59 Ark. 140, which was an action for the killing of live stock, it was held that a non-expert witness may give his opinion as to how far the headlight of an engine throws a light forward and to the right and to the left, where it appears that the matters to which he testifies have been observed by him, since such matters are those about which men of common understanding may be informed upon observation.

Necessity of Testimony of Eye-witnesses.—In *Sweet v. Chicago, M. & St. P. R. Co.* (S. Dak., Sept. 1, 1894), 60 N. W. Rep. 77, it was held that in an action against a railroad company for killing stock at a highway crossing on its right of way, an eye-witness to the collision is not indispensable to a recovery. *Citing Stutsman v. Railroad Co.*, 53 Iowa, 760; *Clark v. Railroad Co.*, 55 Iowa, 455.

Sufficiency of Circumstantial Evidence.—In *Kennedy v. Chicago & N. W. R. Co.* (Iowa, Feb. 2, 1894), 57 N. W. Rep. 862, which was an action for the killing of a bull, to which there were no eye-witnesses, there was no question but that the animal got upon the right of way through an opening in the right-of-way fence, and fell or was thrown from a bridge, and injured so that it had to be killed; and it was held that, as the evidence as to the tracks of the animal with reference to the bridge, the marks on the ties, and injuries upon and the position of the bull, and the number of trains that passed that night, precluded every other conclusion as reasonable, except that the bull was struck by a passing train at the point to which his tracks were nearest the bridge, and carried onto and dropped over the bridge at the point where he was found, there was sufficient to establish the liability of the company.

Sufficiency of Evidence to Justify Finding that Animal was Struck by Train.—In *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 28, 1895), 61 N. W. Rep. 1058, which was an action for the killing of two horses, the engineer of the train which it was alleged caused the damage testified that he struck but one horse; and it appeared that the other was found dead on the track, over which but one train had passed that night, and that no other train could have passed because of the presence of the body of the horse upon the track; and it was held that since the second horse might have been struck without the knowledge of the train employes, and might have gone back again on the track after the train had passed and there died, the jury were warranted in finding that the death of both horses was caused by the train.

Admissibility of Statement of Section Foreman as to Cause of Death of Animal.—In *St. Louis & S. F. R. Co. v. McLelland* (U. S. Cir. Ct. App. 8th Cir., May 31, 1894), 62 Fed. Rep. 116, which was an action for the killing of a colt, it appeared that there were no eye-witnesses to the casualty, and plaintiff was permitted to testify in his own behalf that defendant's section foreman had told him that "the colt had been knocked off the track;" it also appeared that the interview at which this statement was alleged to have been made took place some time after the discovery of the colt by the foreman, and there was nothing in the records to show that such statement was made in connection with the transaction of any business with the plaintiff, or in the discharge of any duty which he had been deputed to perform for or on behalf of the company, and it was held that the evidence was improperly admitted. The court said: "It is a fundamental rule that statements made by an agent are not admissible against his principal, unless they are made in the course of some business transaction in which the agent is authorized to represent his principal, or unless

the statements made are so coincident with the act or event out of which the suit originates as to form a part of the *res gestæ*. The statement said to have been made by the section foreman to the plaintiff was not admissible against the defendant company, within either branch of the rule last stated. So far as the record shows, he had not been deputed to conduct any negotiation with the plaintiff which rendered any statement by him, with reference to the manner in which the colt had been injured, either relevant or pertinent. The statement in question was also made at a period of time so remote from the occurrence of the injury that it was not a part of the *res gestæ*, but was merely a narrative of a past transaction. There are very many cases in which testimony of the same character has been held inadmissible, but we will only refer to a few which bear a very strong analogy to the case at bar. *Smith v. Railway Co.*, 91 Mo. 58, 61; *Packet Co. v. Clough*, 20 Wall. 528, and citations; *Railroad Co. v. O'Brien*, 119 U. S. 99, 27 Am. & Eng. R. Cas. 232; *Worden v. Railroad Co.*, 72 Iowa, 201; *Railway Co. v. Reeves (Ky.)*, 11 S. W. 464."

Admissibility of Unauthorized Statements of Section-boss as to Value of Animal Killed.—In *Halverson v. Chicago, M. & St. P. R. Co. (Minn.)*, May 4, 1894, 58 N. W. Rep. 871, it was held that, in a suit against a railroad company for the value of stock killed, the statements of its section-boss as to the value of stock are not competent evidence of such value, unless it is proved that he had authority to bind the company by such statements. *Citing Wall v. Railway Co. (Iowa)*, 56 N. W. 436; *Doyle v. Railway Co.*, 42 Minn. 78, 41 Am. & Eng. R. Cas. 376.

Proof of Damages—Cost of Animal to Owner.—In *Jacksonville, T. & K. W. R. Co. v. Jones (Fla.)*, July 31, 1894, 15 So. Rep. 924, it was held that while the measure of recovery for personal property destroyed is its value at the time of destruction, and which is ordinarily fixed by ascertaining what was then its market value, yet it will be error to refuse to permit the defendant to show the cost of the property [in this case a mule] to the plaintiff, when it is made to appear that the latter purchased the property a short time before it was destroyed, and that the purchase-price tended to fix the market value of such property.

Proof of Value of Cattle Killed—Ruling out Question by Company as to Price Paid for Cattle—Harmless Error.—In *Jacksonville, T. & K. W. R. Co. v. Prior (Fla.)*, July 16, 1894, 15 So. Rep. 760, which was an action against a railroad company for the killing of cattle, plaintiff and another witness in his behalf testified that they were familiar with the market value of cows in the county where plaintiff's cows were killed, and stated the value of the cows killed. Defendant offered no evidence in contradiction of the value placed on the cows by plaintiff and his witness, but, on cross-examination of plaintiff, asked him what he paid for the cattle. This question was ruled out by the court, on objection of plaintiff, and it was held, that as the question was general, having no reference to place or time, and as it did not appear that defendant was injured by excluding the question, there was no error.

Propriety of Hypothetical Question as to Value of Hide of Animal Killed.—In *Memphis & C. R. Co. v. Davis (Ala.)*, Jan. 31, 1894, 14 So. Rep. 643, which was an action against a railroad company for the killing of cattle upon its track, the defendant attempted to reduce the damages by testimony designed to prove that the hide could have been taken from one of the oxen killed, and something realized therefrom, and with that view the following question was propounded: "If one of those oxen had one hind leg broken and his hide injured only on that leg, and one horn knocked off, what would you consider the hide worth?" and it was held that the question was properly disallowed, for the reason that it appeared that when the carcasses were discovered decay and putrescence had

set in, and because the testimony did not justify the hypothesis of the inquiry, since it showed that the ox had one horn knocked off, and that his hind quarters were badly mangled.

Instructions—As to Duty of Engine Hands to Look Out for Cattle.—In *McCracken v. Chicago, R. I. & P. R. Co.* (Iowa, May 17, 1894), 58 N. W. Rep. 1085, which was an action for killing stock, complaint was made of a charge that in determining the question of the negligence of the company the jury should consider that "it is the engineer's duty to sit on the right side of his cab and look ahead, and the fireman's duty to shovel coal in the furnace and keep up the fire, and, when not so engaged, sit on the left side of the cab and look ahead for obstructions and dangers," and that the court did not express in each instruction the distinction between the duties of the engineer and of the fireman, and that the fireman was not required to look for obstructions while firing, and it was held, that the respective duties of the engineer and fireman were sufficiently emphasized in the instruction quoted, that the others must have been understood in the light of that instruction; and that the others did not make it the duty of the fireman to stop the train, but would bear such construction only in the sense that it was the duty of the fireman to notify the engineer of any reasons that he might discover for checking the train.

As to Degree of Proof Required of Plaintiff.—In *Croddy v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 5, 1894), 60 N. W. Rep. 214, an instruction given in an action for the killing of stock by a railroad company, which requires plaintiff not only to prove his case by a preponderance of evidence, but also to overcome a presumption as to the place of the injury, is erroneous.

As to Right of Jury to Consider Circumstantial Evidence.—In *Croddy v. Chicago, R. I. & P. R. Co.* (Iowa, Oct. 5, 1894), 60 N. W. Rep. 214, which was an action against a railroad company for killing stock, it was held that an instruction which in effect informed the jury that they might consider not only the facts directly proven, but also the inferences that fairly arose therefrom, was proper, since such an instruction would allow them to consider circumstantial evidence.

As to Contributory Negligence Consisting of Allowing Cow to Run at Large Within Sight of Railroad Tracks.—In *Erickson v. Duluth & I. R. Co.* (Minn. April 14, 1894), 58 N. W. Rep. 822, which was an action for the killing of a cow, a charge was requested that if the jury found "that plaintiff lived within sight of defendant's tracks, and kept his cow there, and knew that defendant's tracks were not fenced, and that, if allowed to run at large, there was danger that his cow would get on the track and get killed, yet turned his cow out to run at large. he was guilty of contributory negligence, and could not recover," and it was held that the charge was properly refused, since the effect of the instruction asked for would be to hold that in every such case, regardless of other circumstances, the bare fact of allowing the animal to run at large would constitute contributory negligence.

Sufficiency of Instruction to Relieve Company from Liability for Damages Caused by Negligence of Plaintiff.—In *Anderson v. Chicago, R. I. & P. R. Co.* (Iowa, Jan. 28, 1895), 61 N. W. Rep. 1058, an instruction that if the killing of horses was occasioned by the wilful act of the plaintiff or his agent, the jury should find for the company, was held sufficient to relieve the company if the damage was caused by negligence of the plaintiff, and it was likewise held that the refusal to give certain instruction requested, which in substance informed the jury that if the person in care of the horses was guilty of negligence for permitting them to be turned out when and where they were, was not reversible error. The court said: "This liability exists, regardless of the question of negligence. Indeed, the statute expressly declares that liability to exist unless the injury was occasioned by the wilful act of the owner or his agent." *Spence v. Railway Co.*, 25 Iowa,

141; Code, § 1289; Krebs v. Railway Co., 64 Iowa, 670, 20 Am. & Eng. R. Cas. 478; Moody v. Railway Co., 77 Iowa, 80, 38 Am. & Eng. R. Cas. 319.

Province of Jury—As to Negligence in Killing Animal at Private Crossing.—In Bishop v. Chicago, M. & St. P. R. Co. (N. Dak., Feb. 7, 1895), 62 N. W. Rep. 605, it was held in an action against a railroad company for negligently killing an animal at a private crossing, put in by the defendant for the plaintiff's use in passing from one part of his farm to another, the question of negligence is usually for the jury.

As to Facts from which Different Conclusions are Deducible.—In Sweet v. Chicago, M. & St. P. R. Co. (S. Dak., Sept. 1, 1894), 60 N. W. Rep. 77, it was held, that facts fairly proved, from which different unprejudiced minds might properly draw different conclusions as to the cause of the death of an animal or the injury proved, are sufficient to send the case to the jury on that question.

As to Presumptions and Inferences Raised by Testimony of Engine-hands—Conclusiveness of Testimony of Engine-hands.—In Grandby v. Michigan Cent. R. Co. (Mich., March 19, 1895), 62 N. W. Rep. 579, it was held that the testimony of the engineer and fireman of a train, as to the presence of horses on or near a railroad track, was not conclusive, but that inferences suggested, or presumptions raised by testimony as to the fact of knowledge on their part of the presence of the animals in a place of danger, was sufficient to authorize a jury to pass upon the question of their negligence.

As to Negligent Management of Train—Place of Injury and Sufficiency of Inclosure of Track.—In McCracken v. Chicago, R. I. & P. R. Co. (Iowa, May 17, 1894), 58 N. W. Rep. 1085, it was held that where the evidence was not clear as to whether animals were injured by the negligent management of a train, or were injured at a specific place, or whether the railroad track was sufficiently inclosed to exclude the animals therefrom, the questions were for the jury.

As to Exercise of Reasonable Care and Diligence by Train-hands, and Keeping Proper Lookout.—In Louisville & N. R. Co. v. Rice (Ala., Feb. 6, 1894), 14 So. Rep. 639, it was held that whether cattle came upon a track so suddenly and so near to an engine that the persons operating the train could not, by the exercise of reasonable care and diligence, prevent the injury, and whether those persons observed the proper lookout and exercised reasonable diligence or not, were for the jury.

In Louisville & N. R. Co. v. Gentry (Ala., June 21, 1894), 16 So. Rep. 9, the engineer, who was the only eye-witness to the killing of a cow, testified to the effect that she was in a position of danger when he first discovered her about 20 yards ahead of him at the edge of an embankment, that he was maintaining a sharp lookout, and did not discover her sooner. His testimony further showed that immediately on discovering her he used all efforts to avoid danger to her, but that in attempting to cross the track ahead of the engine she was killed. The evidence of another witness introduced by defendant was such as to authorize the jury to draw inferences not in harmony with the statements of the engineer, and to believe that he might have discovered the cow sooner than he did, and in time to prevent the accident by employing proper available means to do so, and it was held that a general charge for the defendant was properly refused. *Oiting Rabitte v. Orr*, 83 Ala. 186; *Boyd v. State*, 88 Ala. 169.

In Louisville & N. R. Co. v. Davis (Ala., June 21, 1894), 16 So. Rep. 10, which was an action for the killing of a colt in the night-time, the owner of the colt testified that the hoof-prints of the animal showed that it had run along the centre of the track for about 180 yards before the engine

struck it. The testimony of the engineer was, that when he first saw the animal it was within 30 feet of his train, and it was held that the court properly refused to give a general charge for the defendant.

As to Negligence of Engineer Subsequent to Observation of Cattle near Track.—In *Louisville & N. R. Co. v. Rice* (Ala., Feb. 6, 1894), 14 So. Rep. 639, which was an action for the killing of live stock by a railroad train, it was held that if the engineer saw the cattle a quarter of a mile before reaching them and when they were standing near the track, where they would not probably have been injured, the question as to whether he was under any further duty to look out for their safety was for the jury.

Setting Aside Verdict Supported by Sufficient Evidence.—In *Eddy v. Evans* (U. S. Cir. Ct. App. 8 Cir., Oct. 2, 1893), 58 Fed. Rep. 151, it was held that in stock-killing cases, where the negligent operation of a train is a question of fact for the jury, the verdict cannot be set aside if there was evidence to support it. *Citing* *Railroad Co. v. Stout*, 17 Wall. 657; *Insurance Co. v. Ward*, 140 U. S. 76, 81; *Railway Co. v. Ives*, 144 U. S. 408, 417, 55 Am. & Eng. R. Cas. 159; *Railroad Co. v. Powers*, 149 U. S. 43, 56 Am. & Eng. R. Cas. 296; *Railway Co. v. Jarvi* (8th Circuit), 10 U. S. App. 439, 3 C. C. A. 433, 53 Fed. Rep. 65; *Railroad Co. v. Foley*, 53 Fed. Rep. 459, 56 Am. & Eng. R. Cas. 273; *Railroad Co. v. Ellis* (8th Circuit), 10 U. S. App. 640, 4 C. C. A. 454, 54 Fed. Rep. 481.

Sufficiency of Notice of Motion for New Trial—Review of Award of Increased Damages Allowed by Statute.—In *Newport News & M. V. R. Co. v. Thomas* (Ky., Feb. 12, 1895), 29 S. W. Rep. 437, which was an action for the killing of stock by a railroad train, it appeared that two days after a verdict was rendered in favor of plaintiff, a motion was made for a judgment for 25 per cent damages under the statute (Gen. Stats. Ch. 57, § 7) and was disposed of; that the next day a motion for a new trial was filed calling in question the action of the court on the motion for the 25 per cent damages, and it was held that the motion for the new trial was filed in due time, and that the judgment awarding the increased damages might be reviewed.

Award of Damages Against Company on Appeal from Judgment in its Favor.—In *Louisville & N. R. Co. v. Pool* (Miss., Jan. 28, 1895), 16 So. Rep. 753, it was held, in an action for killing stock, that a judgment awarding damages against a railroad company on an appeal by the plaintiff from a justice of the peace was erroneous.

What Constitutes Contributory Negligence—Allowing Horses to run at Large.—In *Green v. St. Paul, M. & M. R. Co.*, and *Arnold v. Same*, 55 Minn. 192, it was held, that the bare fact that horses killed were unlawfully running at large did not constitute their owner's wrongdoers as to the railroad company, nor was it contributory negligence *per se* on the part of such owners. *Citing* *Johnson v. Railway Co.*, 29 Minn. 425; *Watier v. Railway Co.*, 31 Minn. 91, *distinguishing* *Moser v. Railway Co.*, 42 Minn. 480. The court said: "The trial court very properly declined to charge the jury, as requested by defendant's counsel, for all of their requests involved the proposition that, at law, plaintiffs were guilty of contributory negligence when allowing their horses to unlawfully run at large; the persons in charge thereof having knowledge that at a point 2½ miles distant defendant's right of way was unfenced. The facts did not warrant any such proposition."

In *Erickson v. Duluth & I. R. R. Co.* (Minn., April 14, 1895), 58 N. W. Rep. 822, it was held that where domestic animals are injured by reason of a railway company failing to perform its statutory duty to fence its road, the bare fact that their owner voluntarily permitted them to run at large, contrary to law, does not, as between him and the railway company, neces-

sarily constitute contributory negligence *per se*. The court said: "It is the settled doctrine of this court that, while the statutory liability of railway companies for domestic animals killed or injured by reason of their failure to fence their roads is subject to the general rule that a person cannot recover whose negligence has proximately contributed to the injury complained of, yet the mere fact of voluntarily permitting animals to unlawfully run at large does not, as between the owner and the railway company, amount, *per se*, to contributory negligence. *Johnson v. Railway Co.*, 29 Minn. 425; *Watier v. Railway Co.*, 31 Minn. 91; *Green v. Railway Co.*, 55 Minn. 192. It was said in *Watier v. Railway Co.*, *supra*, that in such cases, to establish contributory negligence there must be some act or omission of the plaintiff proximately affecting the question of the exposure of the animal to danger, or contributing to the accident. To charge the owner with contributory negligence it must appear that he allowed his stock to run at large under such circumstances that the natural and probable consequence of so doing was that the stock would go upon the railroad track and be injured; that the risk of danger was such that a person in the exercise of ordinary prudence and reasonable care would not have allowed the animals to run at large. Ordinarily this would be a question of fact for the jury. There might be cases where the character of the animals was such, and the danger so imminent, that the court would be justified in holding, as a matter of law, that the owner was guilty of contributory negligence in permitting them to run at large. Such seems to have been the view taken of the facts in *Moser v. Railway Co.*, 42 Minn. 480, which can only on that ground be reconciled with our former decisions. *Biwabik* appears to be a new and small hamlet in the woods on the line of defendant's road, the surrounding country being, as we infer, mainly unimproved and uninclosed. Whether the plaintiff was, as to the defendant, guilty of contributory negligence in allowing, as others did, his cow to run at large during the daytime, for purposes of pasturage, on the uninclosed land in the vicinity of the village, notwithstanding that he knew that defendant's track in that neighborhood was not fenced, was, in our judgment, a question of fact for the jury."

In *Eddy v. Evans* (U. S. Cir. Ct. App. 8th Cir., Oct. 2, 1893), 58 Fed. Rep. 151, it was held that the owners of stock in the Indian Territory have the right to let them run at large, and that when animals stray upon the track of a railroad company they are not trespassing.

Allowing Horses to Graze in Vicinity of Railroad Track.—In *Eddy v. Evans* (U. S. Cir. Ct. App. 8th Cir., Oct. 2, 1893), 58 Fed. Rep. 151, it was held that in the Indian Territory it is not contributory negligence to turn horses loose to graze in the vicinity of a railroad track.

Abandoning Pursuit, in Night-time, of Oxen Lost near Railroad Track, with Knowledge by Owner of Frequent Passage of Trains.—In *Louisville & N. R. Co. v. Williams* (Ala., Jan. 10, 1895), 16 So. Rep. 795, it was held that it was not negligence, contributing to their loss, for the owner of oxen which had wandered off in proximity to a railroad track, to abandon the pursuit of them in the night-time, with knowledge of the frequent passing of trains. The court said: "It is a right of the owner of domestic animals to permit them to run at large, and wilful or negligent injury to them is a wrong furnishing him a right to recover the consequent damages. That they were at large is not, in any sense, contributory negligence. A railroad company is liable for the negligent injury to stock straying on its track; and, when the injury is shown, the presumption of negligence arises, which the company must remove by evidence. Code, § 1147, note. While the statute will not be so construed as to enable an owner of stock who wilfully turns his cattle upon a railroad track to recover for injuries to them, there is no room for the imputation of negligence from the fact

that the cattle are at large with his consent. 2 Shear. & R. Neg. § 452. The abandonment of the pursuit of the oxen was no more than consent for them to run at large, and that they might run at large was the legal right of the plaintiff; and it has been too often decided now to be doubted that it is not contributory negligence. 3 Brick. Dig. p. 726, §§ 117-119."

HILL

v.

MISSOURI PACIFIC R. CO.

(121 *Missouri*, 477.)

Exclusiveness of Remedy Afforded by Statute Against Railroad Companies for Killing Stock.—Rev. Stat. 1889, § 4428, which allows a recovery against railroad companies for the killing of stock, is not an exclusive remedy, nor does it repeal any remedy under the common law, but is merely cumulative, leaving also an action for damages under the rules of evidence as existing at common law in the same situation.

Action Against Railroad Company for Killing Stock—Right under General Allegation of Negligence to Recover at Common Law or under Fence Statute.—In an action against a railroad company to recover for the killing of stock, under a general allegation charging the company with negligence, the plaintiff may maintain his action either by proof of negligence at common law, or by proof of a violation of the statute (R. S. 1889, § 4428) in failing to erect and maintain suitable fences.

Same—Test of Nature of Action.—Whether such an action is brought under the statute, or is brought to recover for negligence at common law, is determined by ascertaining whether, in order to justify a recovery under the petition, it is necessary that plaintiff should prove the negligence specified in the statute, which consists of the failure to fence, or whether it is necessary for him to prove negligence at common law.

Same—Sufficiency of Petition to Charge Negligence at Common Law.—A petition intending to charge the company with negligence at common law is sufficient if it sets out and describes the acts done with a reasonable degree of particularity, and then alleges that such acts were negligently done.

Same—Charge of Series of Negligent Acts as Constituting One Cause of Action.—A petition in an action for the killing of stock by a railway which alleges in one count a series of negligent acts on the part of the company, and as conducive to the injury complained of, states a single cause of action.

Same—Degree of Care respecting Animals Required of Company Operating its Trains at Places where no Fences Exist.—A railway company operating its trains at places where no fences exist, and where there is a likelihood that animals will stray upon its tracks, is charged with the duty of keeping a reasonable lookout for stray animals; and hence when straying stock is killed by one of its trains, the company is liable if its employés could with reasonable care have discovered the stock in time to have avoided the injury.

CERTIFIED from St. Louis court of appeals.

OPINION OF THE COURT OF APPEALS.

THOMPSON, J.—“This action was brought on the 16th of October, 1891, to recover damages for killing certain horses belonging to the plaintiff. The court sustained a demurrer to the petition. The plaintiff elected to stand on his petition; thereupon the court rendered judgment for the defendant, to reverse which the plaintiff prosecutes this appeal. Case stated.

“The petition was as follows: ‘Plaintiff, I. W. Hill, complaining of the defendant, the Missouri Pacific Railway Company, states that defendant is, and at all times hereinafter mentioned was, a railroad corporation duly organized and existing under the laws of the state of Missouri by the corporate name of the Missouri Pacific Railway Company.

“‘That, on the 8th day of November, 1889, and for many years theretofore, said defendant owned and operated a railroad in the state of Missouri, known as the Missouri Pacific Railroad, in part located within the corporate limits of the city of Pacific, in the county of Franklin and state of Missouri, and thence extending westward through the county of Franklin; and the said railroad, where the same crosses the west boundary line of said city, was inclosed by fences along and on the right of way of defendant, on which right of way said railroad was located; and, for a considerable distance from said boundary line into and within the corporate limits of said city, said railroad was, in like manner, inclosed by fences on and along said right of way.

“‘That at the place where, in said town, the said road was so fenced, during all said time, the lands adjoining the said railroad and the right of way thereof, on the south side of said right of way, were used for farming purposes, through which, on the south side of said railroad, a narrow lane ran up to the line of the right of way of said railroad; and, at the point where said lane terminated on the south side of said right of way, a gate, forming a portion of said railroad fence, opened into and upon the right of way of said railroad, through which, when open, horses and other domestic animals could pass from said lane into and upon said railroad and right of way, and, being on said railroad and right of way, could not escape therefrom, except by returning through said gate or passing over defendant’s said fences and cattle-guards connected therewith.

“‘That defendant was not required by law to maintain said fences or gate at said point, but maintained the same of its own volition; and, so maintaining the same, it was the duty of defendant to keep said fences and gate in such condition and so connected with cattle-guards as to prevent horses

and other domestic animals from getting on said road between said fences.

“ ‘That, by reason of the maintenance of said fences at said place, horses and other domestic animals, being on said railroad between said fences, had less chance to escape from being injured by defendant’s engines and trains than they would have had if, being on said railroad at said point, said fences had not existed to interfere with their escape from said railroad and right of way onto said adjoining lands; and, therefore, it was the duty of defendant, while it maintained said fences and gate, to use more than ordinary care to keep the same in such condition as to prevent horses and other domestic animals from getting on said railroad through said gate and fences; yet said defendant, on said day and for many years theretofore, maintained said fences and said gate in said fence on said south side of said railroad in a careless and negligent manner, and repeatedly suffered said gate to stand open and unfastened, and to be without suitable latches and fastenings to hold the same closed.

“ ‘That during all said time said gate had thereon insufficient fastenings, that it would open by natural causes independent of being opened by any person, and by reason of its proximity to said city said gate was peculiarly subject to being left open by persons passing either from said adjoining lands to said railroad or from said railroad to said adjoining lands, through said gate; and during all of said time said gate was often left open and unfastened, so that horses and other domestic animals could, by passing through the same, get on said railroad; and on said day and during all said time defendant had notice of said facts.

“ ‘That the maintenance of said gate at said place, as the same was so maintained by defendant, was negligence on the part of defendant, liable to occasion injuries of the character of the injury hereinafter complained of.

“ ‘That, on the 8th day of November, 1889, by reason of said negligence of defendant, three horses, the property of plaintiff, and of the value of \$500, then lawfully running at large on the south side of said railroad, passed through said lane, and, the said gate not then being securely fastened, passed through said gate, and so got upon said railroad at a point within the corporate limits of said city; and, having so gotten upon said railroad, and being on said railroad between said fences, were frightened by an engine and train of cars then and there being run and operated on said railroad, and ran before said engine and train of cars along said railroad until they were caught, struck, and killed on said railroad, in said

county of Franklin, by defendant, by its said engine and train of cars, on said 8th day of November, 1889.

“ ‘And plaintiff avers that defendant, by its agents and employes, then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars upon said horses, and kill the same.

“ ‘And defendant having so negligently maintained said gate in said fence, in manner and form as aforesaid, for many years and until the injury aforesaid was done to plaintiff, did within a few days thereafter close up and stop said gate by making a permanent fence along and across the same, as before the killing of plaintiff's said horses it might lawfully have done, and ever since that time defendant has maintained said fence across said gate.

“ ‘And plaintiff avers that, by killing his said horses in manner and form as aforesaid, defendant has damaged plaintiff in the sum of \$500, for which said sum, with costs, plaintiff asks judgment.’

“ ‘The grounds of the demurrer were thus stated :

“ ‘First. Said petition does not state facts sufficient to constitute a cause of action.

“ ‘Second. Said petition alleges two separate and distinct causes of action, both united and intermingled in the same court,—the first, for negligently building and failing properly to maintain a certain fence along defendant's railroad, whereby plaintiff's horses were enabled to get upon said right of way, and were killed by defendant's engine and cars ; and the second being for negligence on the part of the agents and servants of defendant in failing to see said horses, and negligently running its engine and cars upon said horses ; the first cause of action definitely alleging the negligence of the defendant itself, and the second alleging the negligence of the servants of the defendant.’

“ ‘In support of this demurrer, the position of the defendant is twofold :

“ ‘First. That the petition does not state an action at common law, but states an action under section 4428 of the Revised Statutes, which is the statute formerly known as section 5 of the damage act, or the single damage act ; and, consequently, that on its face it is barred by the statute of limitations of one year, contained in section 4429 of the damage act, and that this may be reached by demurrer.

“ ‘Second. That it involves a misjoinder of two distinct causes of action.

“1. The question whether the petition states only a cause of action under section 4428 of the Revised Statutes involves two inquiries: First. Whether that section is an exclusive remedy, and repeals any remedy under the common law, in the situation to which it applies, or whether it is cumulative merely, leaving also an action for damages under the rules of evidence existing at common law in the same situation. Second. If the statute is cumulative, whether the petition states a cause of action, to prove which it is necessary to proceed under the statute.

Questions
presented.

“As to the first of these propositions, it is settled in this state that the statute is cumulative, and does not displace the common law in the situation to which it applies; so, that under a general allegation of negligence, the plaintiff may succeed either by proving negligence at common law, or by proving the constructive negligence of the statute in failing to erect and maintain fences in the given situation. Thus, in *Calvert v. Railroad Co.*, 34 Mo. 243, the petition alleged, in general terms, that ‘the defendants, by their agents, servants, locomotives, and railroad cars, negligently and carelessly ran over, maimed, and killed certain cattle belonging to plaintiff, to wit, one cow, of the value of \$25, and one heifer, of the value of \$10, for which he asks judgment.’ It was objected by the defendant on appeal that this petition stated no cause of action; but the supreme court, speaking through Dryden, J., said: ‘The petition in this case contains a clear and concise statement of the facts, imposing a common-law liability upon the appellant for the alleged negligence of its agents. But this is not enough for the appellant, who insists that the petition is bad because it does not likewise aver the facts necessary to create a statutory liability, and for this cause moves in arrest of judgment. It is unjust to the public that the time of the courts should be occupied in the consideration of a question so utterly devoid of merit.’ On a subsequent trial, under the same petition, it was shown by evidence that the injury occurred at a place which was not a crossing of a public highway, and which was not inclosed by a lawful fence. The jury, under the instructions of the court, having found for the plaintiff, the defendant again appealed, on the ground that the petition showed merely a common-law liability, and that no recovery could be had without proof of actual negligence; in other words, that a party seeking to recover under a statute must declare specially on the statute. The court overruled this contention (reaffirming its former decision on the particular point), and held that negligence might be established either by proof of negligent acts, or omissions, re-

Exclusiveness
of statute.

sulting in the injury, or by proof of the constructive negligence created by section 5 of the damage act in the failure to erect a lawful fence. *Calvert v. Railroad Co.*, 38 Mo. 467. The doctrine of this case was reaffirmed by the supreme court in *Iba v. Railroad Co.*, 45 Mo. 469, in the most explicit terms.

"That was an action for killing the plaintiff's cow, brought before a justice of the peace on a statement of a cause of action drawn in the most general terms, as follows: 'The Hannibal & St. Joseph Railroad Company to Henry B. Iba, debtor, for damages amounting to \$65, for a cow killed on railroad on or about the seventh day of November, 1867, \$65.' One of the errors assigned was that the court, in declarations of law, ruled that the plaintiff was entitled to single damages, notwithstanding that actual negligence, other than neglect to build a fence (the neglect stated in section 5 of the damage act), was not proved. This assignment of error raised for decision the question, whether this section of the damage act was exclusive, or whether it left the common-law principle in operation. In giving the opinion of the court, BLISS, J., said, referring to the case just cited: 'The action in that case was not brought for double damages, but the plaintiff relied upon section 5 of the chapter of damages; and the circuit court might have treated the case at bar as prosecuted under the same chapter, and, under the authority of *Calvert v. Railroad Co.*, sustained the statement filed with the justice, though regarding it as in the nature of a common-law petition.' But the case of *Iba v. Railroad Co.* went a good deal further. The jury found in favor of the plaintiff for double damages. The circuit judge refused to render a judgment for double damages, but rendered a judgment for single damages only. This judgment was reversed in the district court, and the plaintiff appealed to the supreme court. In the supreme court the question was raised, not merely whether section 5 of the damage act was exclusive, and repealed the remedy of the common law, but whether section 43 of the railroad act, the act giving double damages for failure to fence, had such an effect. The court held that it did not.

"In giving the opinion of the court on this point, BLISS, J., also said: 'It may be claimed that, when the statute has enacted a special liability, the corporation is exonerated from any other. It is sometimes so. If there would be no general liability for neglect of the duty imposed, unless enacted by statute, then it could only be held for the statutory liability. But when the statute creates a special duty, for the neglect of which a common-law action would lie, that action is not forbidden by the fact merely that an extraordinary liability in the nature of a penalty is also provided. The latter is only

cumulative. The liability for the greater shall not, of itself, exclude the liability for the less, provided the latter could exist without the former; nor shall the greater include the less, if the less is wholly dependent upon the greater. The statute under consideration imposes the obligation to fence. It dispenses with any other proof of negligence if the fence is not built, and it compensates the sufferer with double the loss. If nothing were said about damages, the defendant would be liable for the actual loss; so, I imagine, he would be liable if nothing were said about the evidence. The obligation of itself creates the liability. The right to double compensation may be followed or abandoned. It neither creates nor supersedes the right. That would exist without it.'

"In *Minter v. Railroad Co.*, 82 Mo. 128, it was held that a general statement filed before a justice of the peace, such as the following: 'Hannibal and St. Joseph Railroad Company to John S. Minter, debtor, for killing three hogs,' etc., might be amended in the circuit court by substituting a statement in the nature of a petition under section 5 of the damage act for failure of the railroad company to fence, etc., without introducing a new cause of action.

"In *Boone v. Railroad Co.*, 20 Mo. App. 232, the action was commenced before a justice of the peace, and the plaintiff's statement charged that 'the defendant, by its agents and servants, carelessly and negligently, with its engine and cars, ran over and killed the plaintiff's cow,' etc. Under this statement, the plaintiff, against the objection of the defendant, gave evidence tending to show that the point in question was where the defendant was required by law to erect and maintain a fence on the sides of its road, and that it had neglected to do so. On appeal it was held by the Kansas City court of appeals that this was not error. The court, following the case last previously cited, held in substance that, under a statement setting up a case of negligence at common law, the plaintiff could recover under evidence of the statutory constructive negligence, which consisted of failing to fence under section 5 of the damage act. There are analogous decisions of the supreme court, to the effect that, under a common-law statement or count for negligence in running the defendant's locomotive and cars, it is competent to prove any negligence that contributed to produce the injury complained of, including that of the failure to ring the bell or sound the whistle, which is made negligence by statute. *Goodwin v. Railroad Co.*, 75 Mo. 73, 11 Am. & Eng. R. Cas. 460; *Braxton v. Railroad Co.*, 77 Mo. 755, 13 Am. & Eng. R. Cas. 494.

. If, then, a plaintiff can, under an allegation of negligence at common law, make out a case by giving, either evidence which

would be evidence of negligence at common law, or evidence which is made presumptive evidence of negligence by section 5 of the damage act (Rev. St. § 4428), then it logically follows that the statute has not repealed the common law, but has furnished at most a cumulative remedy. Perhaps the best conception of the subject is that the statute has operated merely to introduce a new rule of evidence in a particular case, where the right is a common-law right; that, however, need not be discussed.

"The next question is whether the petition above set out is, in its proper interpretation, a petition under the statute, or a petition at common law.

"The statute is as follows: 'When any animal or animals shall be killed or injured by the cars, locomotive, or other carriages used by any railroad in this state, the owner of such animal or animals may recover the value thereof in an action against the company or corporation running such railroad, without any proof of negligence, unskilfulness or misconduct, on the part of the officers, servants or agents of such company; but this section shall not apply to any accident occurring on any portion of such road that may be inclosed by a lawful fence, or in the crossing of any public highway.'

Nature of
petition.

"The most cursory glance at the petition will show that it was not only not intended to be a petition under the statute, but that it is not such in fact. In order to determine this question, it is necessary to consider whether, in order to recover under the petition, the plaintiff must prove the kind of negligence named in statute,—that is, the failure on the part of the defendant to erect and maintain a lawful fence,—or whether he can succeed by proving what would be negligence at common law. It is plain that he can succeed by proving negligence at common law, and that he can neglect all that portion of his petition which speaks of the fence being erected, but not being maintained, and commence with that portion where his horses were found upon the track, and where he alleges the fact that 'defendant, by its agents and employes then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars upon said horses, and killed the same,' and yet sustain a recovery.

Test.

"That a petition alleging negligence in the terms last quoted (having, of course, the necessary preliminary matter of inducement) states a good cause of action at common law, either for

killing animals or human beings upon a railway track, is shown by the following decisions: *Schneider v. Railroad Co.*, 75 Mo. 295; *Pope v. Railway Co.*, 99 Mo. 400, 43 Am. & Eng. R. Cas. 290; *Le May v. Railway Co.*, 105 Mo. 361. The principle of these and other decisions in this state is that it is a good and sufficient pleading to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. *Sullivan v. Railway Co.*, 97 Mo. 117. See, also, as illustrating the principle: *Gurley v. Railway Co.*, 93 Mo. 445; *Johnson v. Railway Co.*, 96 Mo. 340.

"In *Schneider v. Railroad Co.*, *supra*, the action was for damages for killing the plaintiff's horse, and the charging part of the petition was as follows: 'Defendant so carelessly and negligently ran and managed its locomotive, engine, and cars on its railroad as to run against and over said horse, thereby killing him.' This was held a good petition. So in *Le May v. Railway Co.*, *supra*, the action was for damages for killing the plaintiff's husband upon the defendant's railway track, and the essential allegations of the petition were that the deceased, 'by the carelessness, negligence, and unskilfulness of the defendant, its officers, agents, servants, and employés, while running, conducting, and managing certain cars, was run over by two cars of said defendant, and which cars were, at the time they ran over the said Frank Le May, carelessly, negligently, and unskilfully conducted and managed by said defendant, its officers, agents, servants, and employés, and received injuries thereby, from which he instantly died.' It was likewise held that this was a good petition.

"It is argued that the petition fails to state a cause of action, in that it alleges that the defendant, 'by its agents and employés then and there running said engine and train of cars, by the exercise of reasonable care could have seen the said horses, and have stopped the said engine and train of cars before overtaking or striking any of said horses, but did carelessly and negligently then and there run said engine and train of cars on said horses, and killed the same;' instead of averring that the defendant, by its agents and employés, saw the horses upon the track in time, by the exercise of reasonable care, to have stopped the engine and train of cars so as to avoid killing them.

"In support of this view of the measure of the defendant's liability, two decisions are cited of the Kansas City court of appeals: *Hoffman v. Railroad Co.*, 24 Mo. App. 546; *Welch v. Railroad Co.*, 20 Mo. App. 477.

Degree of care
required of
company.

"We do not regard these cases as having been well decided. We understand that the supreme court, in *Kendig v. Railroad Co.*, 79 Mo. 207, 19 Am. & Eng. R. Cas. 493; held precisely the reverse, qualifying and explaining its previous decision in *Wallace v. Railroad Co.*, 74 Mo. 594. We, also, think that this conclusion is strongly supported by the analogues of the decisions of the supreme court of this state in regard to the killing or injuring of adult persons upon railway tracks. The doctrine of that court in such cases is that where adult persons are mere trespassers upon the railway track, where they are upon the track at places where it is fenced, and where they have no right to be, the company owes them no duty other than the duty of not wantonly injuring them, after discovering them in their exposed situation; it is not bound to look out for them, and its failure to do so is not negligence. *Barker v. Railroad Co.* 98 Mo. 50, 37 Am. & Eng. R. Cas. 292; *Rine v. Railroad Co.*, 100 Mo. 228, 41 Am. & Eng. R. Cas. 555; *Shaw v. Railroad Co.*, 104 Mo. 656. But, where the place is such that the servants of the railway company may and ought reasonably to anticipate that persons may lawfully be upon the track, as at a highway crossing, or where the track is built upon a public highway, or in a private coal-yard, intersected by railway tracks, and in other cases that might be supposed, then the rule is that the servants of the railway company are under a duty of active vigilance, and that, if by the exercise of ordinary care in the discharge of this duty they might have seen the killed or injured person on the track in time to have avoided killing or injuring him, and they nevertheless failed so to do, the company will be liable. *Harlan v. Railway Co.*, 65 Mo. 22; *Kelley v. Railroad Co.*, 75 Mo. 138, 13 Am. & Eng. R. Cas. 638; *Dunkman v. Railway Co.*, 95 Mo. 244, citing numerous previous decisions of the court to the same effect: *Hilz v. Railway Co.*, 101 Mo. 54, citing cases.

"In this state, the owner of land is not bound to keep his domestic animals upon his premises, or to fence them in, but they are allowed what is called a 'free range,' and he does not become a trespasser from the fact that they stray upon the unfenced lands of another proprietor. *Gorman v. Railroad Co.*, 26 Mo. 441; *Davis v. Railroad Co.*, 19 Mo. App. 425; *Howenstein v. Railroad Co.*, 55 Mo. 33; *Busby v. Railway Co.*, 81 Mo. 43, 22 Am. & Eng. R. Cas. 589; *Turner v. Railroad Co.*, 78 Mo. 578, 581, 19 Am. & Eng. R. Cas. 506. Under the law of Missouri, trespass is not committed by cattle straying upon uninclosed land. *Bradford v. Floyd*, 80 Mo. 207; *Heald v. Grier*, 12 Mo. App. 556.

"It seems, therefore, to follow, on principle, that a railroad

company owes the duty, in running its trains at places where its track is not fenced, and where animals are liable to stray upon its track, to keep a reasonable lookout, with the view of discovering any animals that may so stray upon its track in time to prevent running over and killing or injuring them.

Duty of company.

“2. We now come to the second branch of this demurrer, which is that the petition involves a misjoinder, in one count, of two different causes of action. We do not so read the petition. It seems plain to us that the negligent killing of the plaintiff's horses is the one cause of action alleged therein, and that the act of the defendant's servants in allowing the gate to become open, whereby the plaintiff's horses got upon the defendant's track, into a sort of pocket, so to speak, so that, when pursued by an engine, they would be restrained by the fences on either side from running off the track, and the further fact that the servants of the defendant, in driving the train which killed them, might have discovered them on the track in time to have prevented the accident, is merely the statement of two preceding acts or circumstances of negligence leading up to the single catastrophe. It is obvious that actual negligence may consist of any number of negligent acts preceding the injury or catastrophe, all of them naturally leading up to it and contributing to it, and it cannot be the law that the pleader, in stating his ground of action, is obliged to select one of these precedent acts of negligence, and rely upon that, when that alone may not be sufficient, but two or more, or all of them collectively, may be sufficient, to make out his right of recovery.

Allegation of several negligent acts as stating single count of action.

“Nor is the petition open to the criticism that it proceeds upon the ground that, by fencing its track in the town of Franklin where it was not required by law to fence, and then in leaving the gate open, whereby it created a sort of pocket or horse trap, so to speak, it attempts to state a separate ground of actionable negligence. It may be conceded that that alone would not constitute actionable negligence. For while, as just said, the owner of cattle and horses is not obliged to restrain them from running at large, and, while they are not trespassers if they do run at large upon the unfenced lands of another, yet that other is not on his part to keep his lands in a position of safety to receive them. Thus, where a railroad company accidentally left upon its uninclosed grounds an uncovered well, and the plaintiff's cattle strayed into it and were drowned, the company was not liable for them. *Hughes v. Railroad Co.*, 66 Mo. 325.

“We may take judicial notice of the well-known habits of

animals, and may conclude that horses on a railway track, which is fenced on either side, although at a short distance from the track, would be more apt to run along the track when pursued by an approaching train than to run off the track, and that they would be less apt to leave the track than where the track was entirely unfenced, and a way of escape clear.

"The decision of the Kansas City court of appeals in *Boggs v. Railroad Co.*, 18 Mo. App. 274, presents a considerable analogy to the part of the plaintiff's petition which describes the 'pocket,' so called, in which the horses found themselves penned when they were killed, with the exception that in that case the plaintiff's mule which was killed sustained the injuries which killed him in endeavoring to jump the fence, which was a barbed-wire fence. The court held that, although the company was not liable under the statute (the double-damages act), by reason of the fact that the mule was not killed by an actual contact with defendant's engine or train, yet under the facts of the case, a common-law action for negligence might well be sustained for the omission to comply with a statutory duty.

"Without saying whether or not we should so hold if the same question were before us, we can see that where a railway company undertakes to maintain a fence, and yet leaves a gate in the fence open, so that, when horses get inside the fence, they find themselves on its track and right of way in a sort of pocket, they are more apt to be injured upon the track than where their means of escape is not obstructed by a fence on either side, and, hence, that the servants of the company in running their trains at such a place may be under the duty of keeping a more vigilant watch and exercising greater care to avoid injuring animals upon the track than would rest upon them under other circumstances.

"We are, therefore, of opinion that the learned judge erred in sustaining the demurrer to the petition, and we accordingly reverse the judgment of the circuit court, and remand the cause. But, as our decision is necessarily in conflict with the decisions of the Kansas City court of appeals, above quoted (*Hoffman v. Railroad Co.*, 24 Mo. App. 546, and *Welch v. Railroad Co.*, 20 Mo. App. 477), the cause must be certified to the supreme court for final determination.

"It is so ordered.

"All the judges concur."

John W. Booth, for appellant.

H. S. Priest and *W. S. Shirk*, for respondent.

Duty of company.

BURGESS, J.—This is an action for damages against the defendant for killing three horses belonging to the plaintiff. Defendant demurred to the petition, which was sustained by the circuit court, and plaintiff declined to plead further. Judgment was rendered for defendant, and plaintiff appealed to the St. Louis court of appeals, where the judgment of the circuit court was reversed in an opinion rendered by **THOMPSON, J.** The case was then certified to this court because of a conflict in the opinion with the decisions of the Kansas City court of appeals in *Hoffman v. Railway Co.*, 24 Mo. App. 546, and *Welch v. Railway Co.*, 20 Mo. App. 477. The case is reported in 49 Mo. App. 520. The opinion of the St. Louis court of appeals, upon examination, is believed to be supported by both reason and the authorities cited, and its judgment should be affirmed.

It is so ordered.

All concur.

Pleading in Actions for Killing Stock.—See note, 49 Am. & Eng. R. Cas. 579.

Killing Stock.—*Duties and Liabilities of Railroad Companies as to Animals on Track—Degree of Care Required of Companies' Servants.*—See *Ward v. Wilmington & Weldon R. Co.*, 49 Am. & Eng. R. Cas. 540, and note 548; *Bostwick v. Minneapolis & Pacific R. Co. (N. Dak.)* *Id.* 527, and note 540; *Illinois Central R. Co. v. Noble (Ill.)*, 56 Am. & Eng. R. Cas. 186, and note 192.

Trespass by Animals—Existence of Common-law Rule—Degree of Care Required of Company.—In *Louisville & N. R. Co. v. Cochran (Ala., Jan. 10, 1895)*, 16 So. Rep. 797, it was held that in Alabama the doctrine of the common law in respect to trespass by domestic animals running at large has never prevailed; that uninclosed lands are regarded as common pasture, and that the owner of the domestic animals found thereon is entitled to demand reasonable care and diligence for the prevention of injuries to them (3 Brick. Dig. 725, § 105 *et seq.*).

Duty Required of Railroad Companies and Their Servants to Look Out for Animals at Large.—In *Bishop v. Chicago, M. & St. P. R. Co. (N. Dak. Feb. 7, 1895)*, 62 N. W. Rep. 605, it appeared that a colt belonging to the plaintiff was turned loose to feed upon his land, and, while attempting to pass across the railroad track upon a private crossing, was killed by defendant's cars, and it was *held* that such animal was not, when killed, a trespassing animal, but was lawfully upon the crossing; that defendant, in running its trains, was bound to exercise due care in approaching and passing over such private crossing, and was bound to anticipate that animals and persons might be rightfully upon its right of way at the point of crossing, and that the care required was that commensurate with the danger reasonably to be apprehended at the point of intersection.

In *Eddy v. Evans (U. S. Cir. Ct. App. 8th Cir., Oct. 2, 1893)*, 58 Fed. Rep. 151, it was held that it is the duty of the engineers of trains to keep a careful lookout for stock on the track, and upon its discovery to use all reasonable means to avoid injury. The court said: "The engineer testifies that the horses were run into about midnight; that his engine was 50 feet from the first horse when he saw it; and the testimony of other witnesses tends to show that the second horse was 65 yards further from the

engine than the first,—that being the distance between their dead bodies, as they lay by the side of the track where they were killed. The engineer testifies he applied the air-brake, but he did not blow the whistle, and he gives no reason or excuse for not doing so. It was the duty of the engineer to sound the whistle, as well as to apply the brake; and the jury might well infer that, if the proper alarm-signals had been sounded when the horses were first discovered, or ought to have been discovered, the horse furthest from the engine could and would have got off the track. Whether the jury were justified in drawing the same inference as to the first horse, we need not inquire, for the reason that the instruction asked applied to both horses; and it was not error to refuse it, if the case, as to either horse, should not have been taken from the jury."

In *Memphis & C. R. Co. v. Davis* (Ala., Jan. 31, 1894), 14 So. Rep. 643, it was held that the duty of an engineer, as to stock on the track, is to maintain a vigilant outlook therefor, and when discovering its presence to use all means within his power in order to stop the train. The court said: "He must resort to all other methods known to skilful engineers in order to protect and save property that is thus exposed. This will include shutting off steam, and any other device which human experience has shown to be available and serviceable. If, with watchful diligence, the obstruction could have been discovered in time to stop the train, or otherwise prevent collision, the fault and wrong would be equally as great as if there was a failure to apply the proper preventives after discovering the obstruction, *Railroad Co. v. Kimbrough*, 96 Ala. 127; *Railroad Co. v. Baker*, 94 Ala. 632; *Railroad Co. v. Posey*, 96 Ala. 262; *Railway Co. v. Lazarus*, 88 Ala. 453; *Railroad Co. v. Watson*, 91 Ala. 485, *Railway v. Sistrunk*, 85 Ala. 352; *Railroad Co. v. Caldwell*, 83 Ala. 196, *Railroad Co. v. Bayliss*, 77 Ala. 435. But, as we have often said, the impossible need not be attempted, and no blame can attach for not attempting it. When proper watchfulness has been maintained, if, for any reason, the obstruction has not been discovered until all preventive effort must obviously be abortive, this furnishes a perfect excuse, not only for not stopping the train, but equally for making no attempt whatever to do so. If the obstruction appears on the track in front of the moving train, or in dangerous proximity to it, so near to it as that no sufficient space intervenes for stopping the train, then a failure to resort to some—or even all—of the precautionary measures would be blameless, if a proper lookout has been kept up. *Railroad Co. v. Jarvis*, 95 Ala. 149; *Railroad Co. v. Hembree*, 85 Ala. 481, 38 Am. & Eng. R. Cas. 300; *Railroad Co. v. Smith*, 85 Ala. 208; *Railroad Co. v. Caldwell*, 83 Ala. 196; *Railroad Co. v. McAlpine*, 80 Ala. 73; *Railroad Co. v. Deaver*, 79 Ala. 216; *Railroad Co. v. Bayliss*, 75 Ala. 466, 22 Am. & Eng. R. Cas. 596."

In *Harrison v. Chicago, M. & St. P. R. Co.* (S. Dak., Oct. 17, 1894), 60 N. W. Rep. 405, it was held that in South Dakota a railroad company is not required to be on the lookout for trespassing animals on its track, other than at public crossings; but it is required as soon as an animal is discovered on the track to use reasonable care to prevent injury to the same.

In *Cincinnati, N. O. & T. P. R. Co. v. Bagby* (Ky., Jan. 17, 1895), 29 S. W. Rep. 320, it was held that an engineer is not required to look out for and see animals at all distances on either side of a railroad track, nor to give the danger-signal and stop the train to prevent injury to those straying, unless such animal is actually on the track, or else so near or in such an attitude as would induce a person of ordinary care and prudence to believe there was danger of a collision. The court said: "In this case the engineer did not discover appellee's horse until the train was too near to the private crossing to be checked in time to prevent the collision. When

first discovered by him, the animal was, he testifies, upon a bank, and jumped upon the track when the train was so near that a collision was unavoidable. Conceding the horse might have been seen by the engineer at any point between appellee's gate and the crossing, still he was not required to stop the train, unless he had reasonable grounds to believe the horse would be permitted by its owner to go upon the track in front of the train. It seems to us the engineer was not, in this case, guilty of actionable negligence; for it does not appear that he saw the horse, or had reasonable ground to believe it would go upon the track in front of the train, until it was about to jump on it."

In *Gordon v. Louisville, St. D. & T. R. Co.* (Ky., Jan. 17, 1895), 29 S. W. Rep. 321, it was held that it was not the duty of a railroad engineer to stop or check his train before an animal gets upon the track, and that failure to do so is not negligence, since all that is required is that the engine should be in charge of competent persons, and that the engineer should use all proper and reasonable effort to prevent injury.

In *Louisville & N. R. Co. v. Davis* (Ala., June 21, 1894), 16 So. Rep. 10, it was held that if a railroad company knowingly runs its trains, in the absence of intervening unusual natural causes, under such conditions as would make it impossible for those in charge to prevent injuring stock straying on its track, and injury results, it is accountable for the loss, and that these conditions exist when the train is run in the night-time at such a fast rate of speed that, by reason of the darkness of the night, stock cannot be seen by the aid of a headlight in time to prevent injury by use of the ordinary means and appliances usually found on railroad trains. *Citing Railroad Co. v. Ingram*, 98 Ala. 395; *Railroad Co. v. Harris*, 98 Ala. 326.

In *Ward v. Wilmington & W. R. Co.* (N. Car., Nov. 7, 1898), 18 S. E. Rep. 211, it was held that it was the duty of railroad companies to remove such growth, whether of shrubs, trees, or grain, as is calculated to obstruct the view of their engineers to the outer bank of side-ditches or from all of the ground of which they assume actual dominion for corporate purposes, and that an instruction in a stock-killing case which informed the jury of that duty, in connection with the other circumstances of the case, and as applicable to the testimony, was proper. *Citing Ward v. Railroad Co.*, 109 N. Car. 358, 49 Am. & Eng. R. Cas. 540; *Hinkle v. Railroad Co.*, *Id.* 472.

Negligence on Part of Company—What Constitutes—Excessive Speed—Failure to Keep Proper Lookout.—In *Louisville & N. R. Co. v. Cochran* (Ala., Jan. 10, 1895), 16 So. Rep. 797, which was the action for the killing of a horse by a railroad train, it appeared that the horse, when killed, was pasturing or running at large in a field near the owner's residence, that the railroad track passed through the field and over a curve; that the place of killing was about 250 yards from a point in the curve from which the horse could have been seen by those in charge of the train, and it was undisputed that the train was running at the rate of 40 miles an hour, and could not be stopped within less than 450 yards, and it was held that sufficient was shown to render the railroad company liable.

Inability to Control Train.—In *Louisville & N. R. Co. v. Cochran* (Ala., Jan. 10, 1895), 16 So. Rep. 797, it was held that the running of a railroad train under such conditions or at such a rate of speed as renders it impossible for the servants or agents of the company having the management of it, to avoid injury to animals straying upon the track, is negligence which will render it liable for the consequent injury. *Citing Railroad Co. v. Harris*, 98 Ala. 326; *Railroad Co. v. Ingram*, *Id.* 395; *Railroad Co. v. Davis* (Ala.), 16 So. Rep. 10.

Failure to Give Signals.—In *Jeffs v. Rio Grande Western R. Co.*, 9 Utah 374, it appeared that while a cow was being driven along a street crossing

a railroad track, she was chased by a dog, and in attempting to run from the dog she went on the track and was struck by the engine of defendant which was running at a speed greatly in excess of that permitted by ordinance, and on which no bell was sounded as required by statute, and it was held that there was sufficient to justify a finding that defendant was negligent, and that such negligence was the proximate cause of the injury.

Failure to Check Speed and Give Signals—Animal Running Against Engine.—In *Georgia R. & B. Co. v. Burke* (Ga., Jan. 27, 1894), 20 S. E. Rep. 318, it was held that the failure of the employes of a railroad company to check the speed of a train and to blow the whistle, in approaching a crossing, would not render the company liable for damages in consequence of the killing of a colt, when the colt was not on the railroad track at the time of such failure, but subsequently attempted to cross the track at a point 300 yards below the crossing, and in so doing ran against the engine, and was thus killed by its own act.

Inability of Engineer to Prevent Injury—Inevitable Accident.—In *Toudy v. Norfolk & W. R. Co.* (W. Va., Feb. 3, 1894), 18 S. E. Rep. 896, it was held that if a horse is killed by a train at a public road crossing, and the evidence shows that the train was running at the rate of 12 miles an hour, and the horse walked onto the track 25 or 30 yards in front of the approaching train, and the engineer at once gave two sharp whistles, and the evidence further shows that it was impossible to stop the train, considering its speed, after the horse got on the track, the killing of the horse must be regarded, under the circumstances, as an inevitable accident, and the railroad company is not responsible therefor.

Operation of Train with Headlight of Engine Obscured by Fog, Rain, or Snow.—In *Hilliker-Krebs B. & M. Co. v. Birmingham R. & E. Co.*, 100 Ala. 424, which was an action for the killing of stock, it was held that if from fog, or from driving rain or snow, the light cast from a proper headlight is obscured, the running of a train with reasonable care, in view of such circumstance, will not be deemed negligence. *Citing* *Central R. & B. Co. v. Ingram*, 95 Ala. 152; *Birmingham M. R. R. Co. v. Harris*, 98 Ala. 326.

Killing Horse at Side of or in Rear of Engine by Train Starting at Depot.—In *Louisville, N. O. & T. R. Co. v. Bonner* (Miss., Dec. 11, 1893), 14 So. Rep. 462, the opinion in full, is as follows: "The verdict is not supported by evidence. The horse was killed in some way by the train, but the uncontradicted evidence exculpates the railway company from all blame. It is reasonably certain that the horse was on the side of the train or in rear of the engine, and was caught and drawn under when the train started after its stop at the depot; and, if this is true, no liability attached to the company for the accident. Another trial will afford opportunity to do more exact justice than appears from this record to have been done. If, at night, the horse, in pursuit of grass, was on the dump alongside a car, and was caught by the starting train, surely no negligence from this is imputable to the railway company; and this, we think, is the truth."

Presumption Arising from Fact of Killing—Burden to Rebut Presumption.—In *Louisville & N. R. Co. v. Cochran* (Ala., Jan. 10, 1895), 16 So. Rep. 797, it was held that in actions against railroad companies for injuries to domestic animals straying upon its tracks or road-bed, when the injury, the ownership, and the value of the animal killed are shown, a presumption of negligence arises, making a *prima-facie* case of liability, and the burden of removing the presumption rests upon the company.

In *Memphis & C. R. Co. v. Davis* (Ala., Jan. 31, 1894), 14 So. Rep. 643, it was held that in suits for damages brought under the statute for the alleged negligent killing of live stock by trains of a railroad company, if the killing or injury be proved, the burden is then shifted to the railroad company to relieve itself of the imputation of negligence, and failing to make

such proof, the liability for the injury or damage is established. (Code, 1886, §§ 1144-1147, and note on p. 300).

In *Kelly v. Oregon Short L. & U. N. R. Co.* (Idaho, Nov. 22, 1894), 38 Pac. Rep. 404, which was an action for the killing of a bull, the evidence showed that, on the night when the bull was killed by the train of defendant, it had been snowing up to about 9 o'clock P.M.; that the track at the place of killing was straight for a mile or more; that there were tracks between the rails for some distance, to where the first bull was knocked off the track, and some 20 steps further, to where the second bull was knocked off the track; that there was snow upon the ground; that the animals were black, and could have been seen at some distance by the engineer; and it was held, that sufficient was shown by plaintiff to put the defendant to its proof. The court said: "The only eyewitnesses were the employes of defendant. If there was no want of due care on the part of defendant; if the usual means were resorted to to avoid or prevent the accident, the proof of such facts was in the possession and control of the defendant, and of the defendant only, and we think it was incumbent upon it, under the condition of the evidence, to make such proof. *Citing Railway Co. v. Shaver* (Ark.), 14 S. W. Rep. 864; *Railroad Co. v. Field*, 46 Miss. 573."

Sufficiency of Evidence to Rebut Presumption of Negligence.—In *Hebron v. Chicago, M. & St. P. R. Co.* (S. Dak., Jan. 13, 1894), 57 N. W. Rep. 494, it was held that where, in an action against a railroad company for negligently killing stock trespassing upon the track, the evidence, undisputed either expressly or inferentially, is that the train, then being equipped with proper appliances, in good order, and running at a rate of speed not claimed to be unreasonable, could not be stopped so as to avoid the accident between the point where it was possible for the trainmen to have discovered the stock and the place of the collision, the *prima-facie* case of negligence under the statute is overcome.

It was further held, that in such case a verdict finding negligence on the part of the company was unsupported by the evidence, and that a judgment upon such verdict would be reversed.

Duty of Plaintiff to Overcome Rebuttal of Presumption of Negligence—Character of Evidence Required.—In *Harrison v. Chicago, M. & St. P. R. Co.* (S. Dak., Oct. 17, 1894), 60 N. W. Rep. 405, it was held that negligence is the gist of an action to recover damages for animals killed by a railway company; and when the presumption of negligence arising from the killing is overcome by the evidence of the company, the plaintiff, to entitle him to recover, must prove facts, tending to show that the killing was caused by the negligence of the company, sufficient to warrant a jury in finding such negligence on the part of the company; that such evidence need not be direct and positive, but it must be such as to justify reasonable men in finding that the killing was the result of the company's negligence or that of its servants or employes, and that there must be something more established by such evidence than a mere probability, not the direct result of the facts proven, that the killing was caused by the negligence of the company. Facts and circumstances must be shown sufficient to bring conviction to fair-minded men, without resorting to mere conjecture or uncertain and inconclusive inferences.

Sufficiency of Evidence to Support Finding of Negligence by Jury.—In *Memphis & C. R. Co. v. Davis* (Ala., Jan. 31, 1894), 14 So. Rep. 643, the persons in charge of an engine testified that cattle killed was not shown to them by the headlight until so near to the engine that it could not be stopped; and that the cattle were then walking toward the track on a level. Other witnesses testified that they were killed in a cut, and apparently after they had run some 300 yards on the track, and by its side; and the

wounds and bruises on the carcasses showed that they had been struck from the rear; and it was held that the testimony on the part of the railroad company justified a finding that it had not overcome the presumption that the injury was caused by its negligence.

Absence of Eye-witnesses to Injury.—In *Green v. St. Paul, M. & M. R. Co.* (Minn., Jan. 29, 1895), 61 N. W. Rep. 1180, which was an action for the killing of a horse on a railroad track, the evidence tended to show that the horse was last seen uninjured between 7 and 8 o'clock the evening before his injury, some three fourths of a mile from the point where he came upon the track; that the defendant's railway train passed along the track about one hour later, going in the same direction as the horse did after he came upon the track; that he was found the next morning at the place where injured; that the tracks made by him along the roadbed, from the starting point to place of injury, justified the conclusion that he was frightened, and ran as swiftly as he could, never stopping at the cattle-guard, and that there was blood and hair on the bridge, indicating that he had been shoved off the bridge; and it was held that the most reasonable and natural conclusion was that it was the railway train that so frightened and drove the horse—that if, in fact, this conclusion was wrong, the defendant's trainmen could have been called by it, and made the matter clear, since they must have known what the fact was, and that in the absence of this evidence the jury were fully justified in returning a verdict for the plaintiff.

Liability of Company for Negligence Subsequent to Presence of Stock on Track.—In *Louisville & N. R. Co. v. Rice* (Ala., Feb. 6, 1894), 14 So. Rep. 639, it was held that a railroad company is liable for injury to cattle resulting from negligence committed subsequently to the time they got on the track, although there may have been no negligence prior to that time.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. Co.

v.

PARKS.

(*Arkansas Supreme Court, January 12, 1895.*)

Presumption of Law Arising from Killing of Wounded Animal on Track by Railroad Employee.—The fact that an animal found wounded on the right of way of a railway company is afterwards shot by an employé of such company, raises no presumption of law that the animal was wounded by the trains of the company.

APPEAL from Hot Spring circuit court.

Appellee, James T. Parks, was the owner of a mule which was found wounded on the right of way of the appellant railway company. He brought suit against the railway company for damages, alleging that the injury was caused by defendant in the operation of its locomotives and cars. On the trial the appellee testified, in substance : That

Case stated.

after the injury he found the mule 15 or 20 feet from the railway track. Its right fore leg was broken above the ankle. The bone was sticking out, and the foot hanging by the skin. Several persons came to look at the injured mule, and some one said it ought to be killed; and thereupon a gun was brought, and one of the section men shot it. That he neither consented nor objected to the shooting of the mule. The mule was found near a culvert, on the railroad, and the appellee further testified that he looked, and found the tracks of a mule going towards the culvert; that the tracks were visible within 15 or 20 feet of the culvert, and then disappeared. On the other side of the culvert, where the mule was lying, tracks were also visible to within about 15 or 20 feet of culvert, and, to use language of appellee, "seemed to slope off down the dump to where the mule was lying." Some of the witnesses testified they found hair on the culvert similar to the hair of the mule. No one saw the mule at the time of the injury.

The court, among other instructions, gave the following, over the objection of the railway company: "(1) The jury are instructed that when stock is found on the right of way of defendant company, mortally wounded, and its agents or employes kill the stock, as in this case, then the burden of the proof that the mule was not negligently killed by defendant is on the defendant to establish." "(6) The court instructs the jury that there is no presumption that the defendant killed or injured the mule by merely finding it injured on the right of way, and near to and off the tracks of defendant, unless they find that the mule was mortally wounded, and its agents or employes killed same afterwards."

To the giving of each of these instructions, defendant excepted at the time. There was a verdict and judgment against defendant, and, a new trial being refused, the case was appealed.

Dodge & Johnson, for appellant.

RIDDICK, J. (after the foregoing statement).—It is evident that, at the time the mule was shot, it was of no value. The appellee himself must have been of this opinion, for when some one said, in his presence, that it was "suffering pain, and ought to be shot," he made no objection. So we take it that he was not injured in any way by this shooting. His complaint alleged that the mule was killed by the locomotive and cars of the railway company. The answer of the railway company denied this allegation. The question before the jury was whether or not the circumstances in proof were sufficient to prove that the in-

Question presented.

juries to the mule were caused by defendant in the operation of its trains, and we need only consider whether the instructions of the court touching this question were correct or not.

It has been several times held by this court that the mere fact that an animal is found on the right of way of a railway company, injured, raises no presumption of law that its injuries were occasioned by the running of the trains. In such a case, to raise the statutory presumption of negligence against the company, there must be evidence to show that the injury was occasioned by the trains of the company. *Railway Co. v. Hagan*, 42 Ark. 126, 19 Am. & Eng. R. Cas. 446; *Railway Co. v. Sageley*, 56 Ark. 551.

When an animal found wounded on the right of way of a railway company is afterwards shot by an employé of such company, this raises no presumption of law that the animal was wounded by the trains of the company. If, in any event, it could be said that such shooting was competent to go to the jury, as a circumstance tending to throw light on the question of what was the cause of the injury to the mule, still, it would not be proper for the court to tell the jury that such an act shifted the burden of proof from the plaintiff to the defendant; for, even if competent, it would only be a circumstance for the jury to consider in connection with the other circumstances in the case. But there is nothing to show that, in shooting the mule, the section hand was acting as the agent of the railroad company. So far as the proof discloses, this foreman and his men had no power to affect the railway company by their acts or admissions in regard to the injury to the mule. It was not within the scope of their apparent authority to do so.

Presumption
of injury by
train.

We think that the shooting of this mule had no proper bearing on the question of what was the cause of the original injury to it, and that the court erred in so instructing the jury.

The judgment is therefore reversed, and the cause remanded for a new trial.

BUNN, C.J., being absent, did not participate.

MATHEWS

v.

ST. LOUIS & SAN FRANCISCO R. CO.

(121 *Missouri*, 298.)

Constitutionality of Act of March 31, 1887. Imposing on Railroad Companies Absolute Liability for Damages Caused by Escape of Fire from their Locomotives—Impairment of Obligation of Contract.—The act approved March 31, 1887 (Rev. Stat. 1889, § 2615), imposing on railroad companies an absolute liability for damages to property from fires communicated by their locomotives, is not unconstitutional because impairing, by subjecting to an increased burden, the rights given to it by a charter previously granted authorizing it to propel its cars by steam.

Same—Denial of Equal Protection of the Laws.—Neither is the act unconstitutional because denying to railroad companies the equal protection of the laws.

Same—Deprivation of Property Without Due Process of Law.—Nor because depriving such corporations of their property without due process of law.

Relief of Company from Statutory Liability by Proof of Diligence and Care.—Since the statute makes the companies absolutely liable for injuries resulting from fire communicated by their engines, proof of diligence and care on the part of a company will not release it from liability.

Non-insurable Nature of Property Destroyed as Defeating Right of Owner to Recover.—The statute gives to railroad companies an insurable interest in property along their lines of road. *Held*, that the fact that the property destroyed was not of an insurable nature would not defeat the right of the owner thereof to recover for its destruction.

Contributory Negligence of Owner of Destroyed Property—Allowing Dried Weeds to Remain on Land Adjoining Company's Right of Way.—The fact that the person who suffered injury by fire, communicated by the engines of the defendant company, allowed dried weeds to remain on his land adjoining the right of way of the company, will not constitute such contributory negligence as will defeat or lessen a recovery by him.

Degree of Contributory Negligence which will Defeat Recovery.—Since the statute makes railroad companies insurers against fires set out by their engines, contributory negligence short of fraud will not furnish any defense to the action.

Abatement of Recovery to Extent of Insurance Moneys Received by Owner of Property Destroyed.—The fact that the statute allows railroad companies to insure property along the lines of their road against loss by fires set by them, will not give to a company which has failed to insure property so destroyed the right to an abatement of the recovery against it by the owner of such property, to the extent of the insurance money which the owner has received.

Effect of Allowance of Claim to Owner of Property Destroyed, in Proceedings to Condemn Right of Way, for "Damage of Fire for all Time to Come."—The fact that, in proceedings by the company to condemn a right of way through plaintiff's land, compensation was claimed and allowed for "damage of fire for all time to come," will not constitute a defense on the part of the company to an action against it under the statute.

APPEAL from St. Louis circuit court.

Statement by GANTT, J. :

This is an action for damages caused by the destruction and injury to plaintiff's property, a suburban residence and grounds near the city of St. Louis, in St. Louis county, by fire alleged to have been set out by an engine operated by the defendant on its railroad. Case stated.

The petition contains two counts: the first being an action at common law, charging "that on the 9th day of August, 1887, and for a long time prior thereto, defendant negligently suffered a large amount of dry grass, weeds, and rubbish to accumulate and remain upon and along its railway and right of way adjoining the land of the plaintiff, and used and employed in operating said railway locomotive engines and other machinery that were improperly and negligently constructed, so that sparks of fire could and did needlessly escape said engine," and that by reason of such negligence fire was communicated to said dry grass, weeds, and rubbish, and extended to plaintiff's land, and destroyed a dwelling-house, barn, out-buildings, personal property therein, trees, and shrubbery, of the value of \$30,000, for which judgment is prayed.

The second count is based upon the statute (Rev. St. 1889, § 2615), and charges that the defendant owned and operated a railroad adjoining plaintiff's land, "having locomotive engines in use on the same; and on said 9th day of August, 1887, fire was communicated from a locomotive engine then in use upon said railroad, owned and operated by defendant as aforesaid, to plaintiff's property on his said land;" and then avers the destruction of the same property, of the same value as charged in the first count, and avers damages in, and prays judgment for, the same amount.

The answer admits the incorporation of defendant and the operation of the line of railway described in the petition, and the use of locomotive engines thereon, and denies generally every other allegation in the petition, and then, as special defenses to each count of the petition, avers:

"(1) That plaintiff has assigned to persons, to this defendant unknown, his right of action against this defendant, if any he ever had, and is neither a necessary nor proper party plaintiff herein, and is not the real party in interest, and is not, therefore, entitled to maintain or prosecute this action.

"(2) That there is a defect of plaintiff in this, to wit, that the Detroit Fire & Marine Insurance Company, the Commercial Union Insurance Company, and the Imperial Fire Insurance Company, and each and every one of them, are parties in interest in this case, and are necessary parties plaintiff herein.

"(3) That, on the date and at the time in the petition mentioned, there were growing and standing upon the property in said petition described, adjacent to and continuous from the right of way of defendant to the house, shrubbery, and trees of plaintiff in his petition described, large quantities of dry grass, leaves, weeds, and other combustible and highly inflammable matter, which were carelessly and negligently allowed to grow and accumulate upon said premises by and with the knowledge and consent of plaintiff; that the accumulation of dry, combustible, and highly inflammable matter as aforesaid had been carelessly and negligently allowed to remain upon said premises for a long time previous to the 9th day of August, 1887, to wit, for many years; that it was gross negligence for plaintiff to allow said dry and combustible matter to accumulate and remain upon his said premises without taking precautions to prevent the spread of fire which might accidentally be set upon the right of way of defendant railway company, or which might accidentally escape from passing engines, which said negligence of plaintiff did proximately and directly contribute to the injuries of which he complains.

"(4) That the said dwelling-house, barn, and outbuildings in the petition described were on the 9th day of August, 1887, insured in certain insurance companies named in the answer for the aggregate sum of \$10,000, which, as defendant avers, was greatly in excess of the real value of said dwelling-house, barn, and outbuildings; that said insurance companies, after the fire in plaintiff's petition alleged, paid to said plaintiff the sum of \$10,000 on account of the loss sustained by reason of the burning of said dwelling-house, barn, and outbuildings as aforesaid. Wherefore defendant says that the sum so paid by the said insurance companies as aforesaid should be applied *pro tanto* to the satisfaction of plaintiff's claim, if any he has, which defendant denies."

And the answer, in addition to the above counts, which are common to both counts of the petition, contains the following counts, which are addressed to the second count of the petition only:

"(5) Defendant avers that the alleged cause of action set forth in the second count of the petition is founded on an act of the legislature of the state of Missouri, entitled 'An act to establish the responsibilities of railroad companies and persons owning or operating railroads for damages by fire communicated by locomotive engines,' approved March 31, 1887, which act defendant avers is illegal, unconstitutional, and void in that it seeks to deprive the defendant of its property without due process of law, and is contrary to the provisions

of section 30, art. 2, of the constitution of the state of Missouri.

"(6) That the said act of the legislature is illegal, unconstitutional, and void, in that it denies the defendant the equal protection of the law, contrary to the provisions of section 1, art. 14, of the amendments to the constitution of the United States; and in this: that it deprives defendant of its property without due process of law, contrary to the provisions of article 5 of the amendments to the constitution of the United States; and in this: that it impairs the obligations of a contract made between the state of Missouri and defendant, by the terms of which it was impliedly agreed that said defendant might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and be responsible only for the negligent and careless use thereof; and is contrary to the provisions of article 1, § 10, of the constitution of the United States.

"(7) That heretofore, to wit, on the 1st day of June, A.D. 1882, the plaintiff was the owner of the land described in his petition, and also of a certain strip of land along and adjacent to the west side of said tract, 100 feet wide, being the same strip of land now occupied by defendant's roadbed and right of way, and that defendant was desirous of building its road upon said strip. That plaintiff and defendant could not agree as to the amount of compensation to be paid to plaintiff for said strip, and defendant commenced proceedings in the circuit court of St. Louis county against plaintiff, the object and nature of which was to condemn a right of way upon said strip and through and along plaintiff's said land. That commissioners were duly appointed by said circuit court of St. Louis county, before whom the matter of compensation of plaintiff was to be heard, and before whom was then and there pending, among other things, the question of how much compensation plaintiff should receive from defendant: first, for actual amount of ground taken; second, for the injury to the property as a place of residence, caused by running the road where it now runs; third, for cutting up or dividing the property then owned by plaintiff into detached portions; fourth, for danger of fire for all time to come. That thereafter, to wit, on the 1st day of July, A.D. 1882, the said matters so pending before said commissioners were all compromised and settled between plaintiff and defendant upon the agreement that in consideration of all of said matters the defendant should pay plaintiff the sum of nine thousand dollars, in full payment, settlement, accord, and satisfaction of said right of way and said strip of land, and all the matters and things so pending before said commissioners as aforesaid. That thereafter, to wit,

on the 15th day of July, A.D. 1882, defendant, for the consideration aforesaid, paid to said Leonard Mathews, and said Leonard Mathews received from the defendant, the said sum of nine thousand dollars, pursuant to and in compliance with said contract and agreement. Wherefore defendant says the plaintiff ought not to prosecute or maintain said cause of action in said second count set out."

The replication was a general denial of all new matter set up in the answer.

Upon the trial, and when the plaintiff first offered testimony in his behalf, the defendant objected to the introduction of any testimony for the reasons :

"(1) That the petition does not state a cause of action ;

"(2) That, in the first count, plaintiff has not specifically pleaded ;

"(3) That he has combined two causes of action in one count, involving different rules of evidence, and different measures of damage ;

"(4) That the law on which the second count is based is unconstitutional."

These objections were overruled, and exceptions duly saved by defendant, and thereupon defendant moved the court to require plaintiff to elect between the two counts in his petition, "because the measure of damages in the alleged causes of action set forth in said petition are totally different, and because a different, and not the same, proof is required to support each of the said alleged causes of action." This motion was by the court overruled, and exception duly saved by defendant.

The testimony on the part of plaintiff tended to show that the plaintiff was the owner of a piece of real estate lying between the Pacific Railroad on the north, and the St. Louis & San Francisco Railway on the south, Holmes avenue on the west, and the property of Anderson on the east ; the northern part of this tract, containing about $11\frac{1}{2}$ acres, and lying between the Pacific Railroad and Elliott avenue, was called the "Home Place," and was bounded by osage orange hedges on the south, east, and west. This home place had been improved and planted on plans prepared by a landscape gardener, and contained a large assortment of all kinds of ornamental trees, shrubbery, and plants, as well as fruit trees and vines. There was on it a large dwelling, of 19 rooms,—the front or main building made of concrete, and the rear building of frame, in imitation of stone ; also, a large barn, of 75 feet in length by 30 feet in width, with a bowling alley therein, and a cow-shed attachment. There were also one or more outbuildings of no very considerable value, and in the house,

barn, and bowling alley some personal property, to the amount of probably two or three hundred dollars in value. As is generally the case, the testimony as to the value of this house and barn, and of the property as a whole, with its improvements by planting, etc., was conflicting; plaintiff's witnesses putting the value of the house and barn alone as high as \$18,000, and the value of the shrubbery, etc., destroyed, as high as \$6000.

On the afternoon of August 9, 1887, at a time when everything was very dry, a fire started along the railroad track and on the railroad right of way adjoining plaintiff's property, and at a point southeast of the barn, and was carried by a south or southeast wind, with great rapidity, into plaintiff's property, set fire to the barn, and then to the house and outbuildings, and ran pretty much over the whole place, destroying the buildings, and much the larger part of the trees, plants, shrubbery, vines, etc.

Albert B. Chandler testified: He was at home, south of the railroad, opposite Mr. Mathews' place, on the day of the fire. It started near where Elliott avenue crosses the railroad, and swept up the railroad bank there, and caught the Mathews barn, and burned it down, and the shingles flew from the barn, and burned the house. After the fire, he went down, and saw ashes on the track, and saw where the fire had burned up the bank. He stirred the ashes, and there were a few coals. When he first observed the fire, it was going up the railroad bank.

Samuel K. Harding testified that on the 9th day of August, 1887, he was a brakeman in the employ of the defendant, and on that day was braking on a train which was called the "Hoodlum," and which passed plaintiff's place about 2 o'clock in the afternoon, and when it passed there he was on the rear part of the train, and saw some grass on fire on the defendant's right of way, opposite the Mathews place, about six or eight feet from the ends of the ties, on the bank in the cut. This fire was about three feet across. The engine gave out a great many sparks. He had noticed before that it gave out sparks. He had been running on that train since the 1st of August.

The place was occupied by plaintiff as a residence up to 1880, when he removed to St. Louis, leaving a man named Cleary in charge of the place. Cleary lived in the back part of the house, and took care of the place, till 1883, when it was rented to a Mr. Wright, who lived there until September, 1884, from which time until the fire the place was vacant, except that some member of plaintiff's family would go out once in a while, and sometimes stay all night, and sometimes a week or two.

After the fire, plaintiff sold the place for \$9000. There was verdict and judgment for plaintiff for \$11,000. In due time, motions for new trial and in arrest of judgment were filed, heard, and overruled, and defendant appealed to this court.

E. D. Kenna, for appellant.

John G. Chandler, for respondent.

GANTT, P.J. (after the foregoing statement).—1. Among the grounds assigned for the reversal of the judgment of the circuit court is the unconstitutionality of section 2615 of the Revised Statutes of 1889 (Laws 1887, p. 101), which is as follows:

Constitution-
ality of act of
1887.

“Each railroad corporation owning or operating a railroad in this state shall be responsible in damages to every person and corporation whose property may be injured or destroyed by fire communicated directly or indirectly by locomotive engines in use upon the railroad owned or operated by such railroad corporation, and each such railroad corporation shall have an insurable interest in the property upon the route of the railroad owned or operated by it, and may procure insurance thereon in its own behalf for its protection against such damages.” It is argued by counsel that this act is unconstitutional for three reasons: “It impairs the obligation of a contract; it deprives defendant of its property without due process of law; it denies to defendant the equal protection of the laws.” The defendant is a railroad corporation organized under the general laws of this state on the 10th of September, 1875, and prior to the passage of section 2615. The contention of the defendant raises a question of prime importance, and has received our most careful consideration.

Does section 2615 impair the obligation of the contract made by the state in the grant of defendant’s charter? The claim is that it interferes with the right of defendant, granted

Impairment of
obligation of
contract.

in the sixth paragraph of section 2543, Rev. St. 1889, to propel its cars by steam, in subjecting it to an increased burden or liability, for fires set out by its locomotives. Said paragraph is as follows: “Sixth. To take and convey persons and property on their railroad by the power or force of steam or of animals, or by any mechanical power, and to receive compensation therefor.” Defendant insists that because there was no statute in force at the time it was organized which would render it liable for damages by fire in the absence of proof or presumption that it had been guilty of negligence in the operation of its trains, the construction of its engines, or the care of its right of way, and because the decisions of this court prior to the adoption of this section had never held it liable in such cases save for

negligence, the law on this subject, as then understood, became part of its charter, and hence inviolable, under the constitution of the United States.

It is wholly unnecessary to review the decisions which sustain the view adopted in the Dartmouth College Case,—that defendant's charter is a contract between it and the state. It has been uniformly followed by this court. This ground has been gone over so often, and this limitation so thoroughly discussed, that nothing new can be said on the subject. Says Judge Cooley, in his great work on Constitutional Limitations (6th Ed., c. 16, pp. 707, 708): "The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied; and it has been held, without dissent, that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important." "All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." "Perhaps the most striking illustration of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the state with a view to the public protection, health, and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of state regulations, and that the charter implies an undertaking on the part of the state that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues." "The obligation of the contract by no means extends so far; but on the contrary the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the

citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment."

To this clear, lucid statement of the rule deduced from the decisions, little can be added, save to point out the various statutes that have been held to be legitimate exercise of the police power inherent in the several states, which cannot be taken from them, in whole or in part, and cannot be exercised by congress.

This identical question was before this court in *Gorman v. Railroad Co.*, 26 Mo. 441. That was an action to recover the value of three head of cattle killed by the railroad company. It was alleged they were killed at a point on the road where it ran through inclosed fields; that defendant had failed to erect and maintain fences as required by law; that the cattle were killed by reason of this failure. The company denied that it was subject to the law of 1853, requiring railroad companies to fence their roads where they passed over inclosed fields. It was conceded that the company's charter antedated the act of 1853, and, moreover, that the legislature, by the act of March 1, 1851, had yielded the right to suspend or repeal its charter. Sess. Acts 1851, p. 270, § 4. Judge SCOTT wrote the opinion of the court, and conceded that the charter was a contract between the state and the company, but held, notwithstanding, that the corporation, like natural persons, was subject to those regulations which the state may prescribe for the good government of the community. He says: "Where such dangerous and powerful agents as steam-engines are brought into use, there should be a power in the legislature to prescribe such reasonable regulations as will prevent injuries resulting from their employment." "The foresight of man is not competent to the task of prescribing in a charter all the regulations which time may show to be necessary for the security of the interests of the people of the state against injuries caused by the introduction of new, powerful, and dangerous agents for carrying on her intercourse and commerce." "The charter must be taken subject to the understanding that in its operation, affecting the interests of society, it will be, like individuals, liable to be controlled by such reasonable enactments as may be dictated by a sense of what is required for the preservation of the persons, lives, and property of the people, such enactments not contravening the expressed or plainly implied provisions of the charter."

He cited with approval the case of *Thorpe v. Railroad Co.*, 27 Vt. 140, in which Judge REDFIELD firmly and ably sustained the power of the state legislature to impose upon existing railroad companies the duty of maintaining fences, and to con-

struct and maintain cattle-guards, as clearly within the police power of the state.

The court also cited with approval the decision of the supreme judicial court of Massachusetts in *Lyman v. Railroad Co.*, 4 Cush. 288, in which it was held that a statute "making the proprietors of railroads responsible for injuries by fire communicated from their locomotive engines applied to railroads established before as well as since its passage, and extends as well to estates, a part of which is conveyed by the owner, as to those of which a part is taken by authority of law for the purposes of a railroad." This statute of Massachusetts enacted in 1840 was the first to render the railroad companies liable for fires put out by their locomotives. It is important to note that the point was made in this first case that the act did not apply to charters granted before its passage, but the claim was denied, the court saying in its opinion that the act was "one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the introduction of the steam-engine." "The right to use the parcel of land appropriated to a railroad does not deprive the legislature of the power to enact such regulations and impose such liabilities for injuries suffered from the mode of using the road as the occasion and circumstances may reasonably justify." This act of 1840 has again and again been held valid, and enforced, by the supreme court of Massachusetts, and its constitutionality never seriously questioned since the first case. *Hart v. Railroad Co.*, 13 Metc. (Mass.) 99; *Ross v. Railroad Co.*, 6 Allen, 87; *Pierce v. Railroad Co.*, 105 Mass. 199.

The Massachusetts act was adopted by the legislature of Maine in 1842, and sustained by the supreme court of Maine in *Chapman v. Railroad Co.*, 37 Me. 92, and in *Pratt v. Railroad Co.*, 42 Me. 579, as binding equally upon corporations whose charters were granted prior to its enactment as to those subsequently organized. The act was adopted by New Hampshire as early as 1850, and enforced by its highest court, in *Hooksett v. Railroad Co.*, 38 N. H. 242. It became the law of Iowa in 1873 (Code, 1873, § 1289), and received a most careful consideration by the supreme court of that state in *Rodemacher v. Railroad Co.*, 41 Iowa, 297, and its constitutionality unanimously affirmed, as a valid exercise of the police power of the state, and applied as well to a company incorporated prior to the enactment as to one subsequently chartered. *Drady v. Railroad Co.*, 57 Iowa, 293, 14 Am. & Eng. R. Cas. 130.

The state of Connecticut also adopted the Massachusetts statute, in effect, in 1881. The constitutionality of the statute

was challenged in *Grissell v. Railroad Co.*, 54 Conn. 447, and fully sustained by the supreme court of that state.

A statute similar in principle was upheld by the supreme court of Colorado in *Railway Co. v. De Busk*, 12 Colo. 294, 38 Am. & Eng. R. Cas. 321.

In *Railway Co. v. McClelland*, 25 Ill. 140, an act requiring all railroads that were open for use to be fenced, and imposing a penalty for noncompliance, was considered; and it was held constitutional, the court saying: "To hold otherwise would be to say that the legislature might create an *imperium in imperio*."

These decisions all agree that subsequent acts imposing the duty to fence, and affixing penalties for a failure, are clearly within the police power of the state, subject to which all laws are enacted in this state; and yet those acts imposed a burden and cost upon the roads, not named in their charter. These laws require the companies, at their own expense, to erect and maintain these fences along their roads. They are sustained on the ground that experience demonstrated that the operation of the roads with steam-engines resulted in great loss to the adjoining owners, in the destruction of their stock lawfully running in their fields, and was liable to cause loss of life, by wrecking trains. The damage by fires set out by trains comes within the same reasoning. It had not been anticipated to what extent engines would destroy the crops and property along the road, but when it was demonstrated that it was a common occurrence; that the company had the right to run its trains at all times of day and night; and that the injured party was powerless, often, to show negligence, on account of his inability to show what particular train had set out the fire, or the particular cause of the fire; and because the owner was entirely innocent, in the premises, of any negligence,—it was determined by the legislature that, when one of two innocent parties must suffer, the one who operated the dangerous agency should suffer the loss. Notwithstanding the great weight of authority that such an act is within the police power of the state, the defendant challenges it here. We are, however, not impressed with its reasons to the contrary. If the state is powerless to protect its citizens from the ravages of fires set out by agencies created by itself, then it fails to meet one of the essentials of a good government. Certainly, it fails in the protection of property.

The argument of the defendant, reduced to its last analysis, is this: The state authorized the railroad companies to propel cars by steam. To generate steam they are compelled to use fire. Therefore, they can lawfully use fire, and, as they

are pursuing a lawful business, they are only liable for negligence in its operation, and when, in a given case, they can demonstrate they are guilty of no negligence, then they cannot be made liable.

To this the citizen answers: "I also own my land lawfully. I have the right to grow my crops, and erect buildings on it, at any place I choose. I did not set in motion any dangerous machinery. You say you are guiltless of negligence. It results, then, that the state, which owes me protection to my property from others, has chartered an agency which, be it ever so careful and cautious and prudent, inevitably destroys my property, and yet denies me all redress. The state has no right to take or damage my property without just compensation." But, what the state cannot do directly, it attempts to do indirectly, through the charters granted to railroads, if defendant's contention be true. When it was demonstrated that although the railroads exercised every precaution in the construction of their engines, the choice of their operatives, and clearing their rights of way of all combustibles, still fire was emitted from their engines, and the citizen's property burned notwithstanding his efforts to extinguish it, and notwithstanding he had in no way contributed to setting it out, it is perfectly competent for the state to require the company who set out the fire to pay his damages. He is as much entitled to protection from fire set out by engines as he is against the killing of his stock by those engines. Neither of these remedies was foreseen as necessary when the charters were granted, but experience has shown both are now necessary for the protection of the citizen; and the organic law of the state prescribed, before defendant obtained its charter, that "the exercise of the police power of the state shall never be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well being of the state." Const. Mo. art. 12, § 5.

Let it be conceded, for it is true, that, prior to the enactment of section 2615, by the decisions of this and other courts, defendant was only liable for negligence in setting out fire. Is it to be concluded that the legislature is powerless to enact laws which will give ample protection to citizens against fires? Most certainly not. Fire, as one of the most dangerous elements, has ever been the subject of legislative control. It ought not to excite surprise among a people, the great body of whose laws had their origin in England, that those who set out fires which destroy the property of others should be held absolutely responsible for them. Such was the ancient common law, before any statutes were enacted. "If my fire, by

misfortune, burns the goods of another man, he shall have his action on the case against me. If a fire breaks out suddenly in my house, I not knowing it, and it burns my goods, and also my neighbor's house, he shall have his action on the case against me. So if the fire is caused by a servant or a guest, or any person who entered the house with my consent; but otherwise if it is caused by a stranger, who entered the house against my will." Rolle, Abr. Action on the Case, B. tit. "Fire." Under ordinary circumstances, this was thought to be a harsh rule, and it was not generally adopted by the courts of the several states; but the question we are discussing is not what the courts have generally regarded as the reasonable rule, but what is the power of the lawmaking power to adopt as a correct one? In considering it, the dangerous character of fire must be kept in mind. Many laws have been sustained which were enacted to prevent destruction of property by fire, which at first blush seemed arbitrary, and infringing on natural right. Thus, the owner of a lot in a city may desire to build a frame or wooden building upon it, but the municipal corporation may establish fire limits, and prevent the building of wooden buildings. *City of Charleston v. Reed*, 27 W. Va. 681; *King v. Davenport*, 98 Ill. 305; *Knoxville Corp. v. Bird*, 12 Lea, 121.

Counsel, in his brief, with great earnestness, insists that "no law can be sustained as a police regulation which imposes a penalty or confers an action for doing that which has never been declared unlawful, and which, on the contrary, is made legal." But has not counsel gone too far in his assumption? Is there anything in defendant's charter that exonerates it from damage by fire it may set out, or permits it to destroy with impunity? If there is, would not the charter itself be liable to the charge of unconstitutionality? *Railroad Co. v. Dick*, 9 Ind. 433. The right to use steam is granted, but it is granted subject to the right of the state to render the company liable for damages it may do in the use.

The position of the defendant is that the law of the state permitting it to use steam in the operation of its trains is a protection from liability for fire set out by its engines, provided it is guilty of no negligence; and he invokes the principle that what the law authorizes cannot be a nuisance, although it may result in damages to individual rights or property. That there are cases where corporations acting in the performance of a public duty imposed upon them by the legislature, or in the exercise of a right conferred by law, and where persons appointed or authorized by law to perform a public duty or to do acts of a public character, are not responsible for consequential damages, if they act within

their jurisdiction, and are guilty of no negligence or want of care, is certainly true. The cases sustaining this rule will generally be found to be those where municipal corporations were engaged in grading and improving public streets or highways, or where the act causing the injury was done by a corporation in the construction of its works upon property acquired under the power of eminent domain. *Transportation Co. v. Chicago*, 99 U. S. 635; *Uline v. Railroad Co.*, 101 N. Y. 98, 23 Am. & Eng. R. Cas. 3; *Conklin v. Railway Co.*, 102 N. Y. 107, 26 Am. & Eng. R. Cas. 365; *Cooley*, Const. Lim. (5th Ed.) 671.

But there is another rule of law, that has passed into a canon of construction, and of great utility in these days, when nearly all the business affairs of the country are carried on under corporate authority, and it is this: That "in the construction of grants by the legislature, whether public or private, only such rights and powers can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the object of the grant." *Carroll v. Campbell*, 108 Mo. 550; *Fanning v. Gregoire*, 16 How. 534; *Minturn v. Larue*, 23 How. 435. "And the rule is now established that the statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance, must be express, or must be a clear and unquestionable implication from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury." *Bohan v. Gas-light Co.*, 122 N. Y. 18; *Cogswell v. Railroad Co.*, 103 N. Y. 10, 27 Am. & Eng. R. Cas. 376; *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 11 Am. & Eng. R. Cas. 15; *Hill v. Managers*, 4 Q. B. Div. 433, 6 App. Cas. 213.

In the case last cited, Lord WATSON said: "When the terms of the statute are not imperative, but permissive; when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put to execution or not,—I think the fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected."

It may be remarked that in the grant to defendant it is nowhere imperatively required and compelled, as argued by its counsel, to use steam. Its charter permits it "to convey persons by the force of steam or animals, or by any mechanical power." To charge that the legislature ever intended, by this grant, to authorize defendant to destroy the property of the adjoining landowners by the use of fire, and deny them

redress therefor according to well-settled principles of the common law, as evidenced by numerous decisions both in England and in the highest courts of this country, would be an imputation upon their sense of justice, and contrary to the ordinary rules of construction of such grants. No good reason can be shown, in my opinion, why the companies organized under this act should not be liable for the damage occasioned by their use of highly-dangerous machinery; but most certainly the hands of all subsequent legislatures have not been so securely tied that they may not adopt a just and equitable rule in such cases, and not be charged with impairing the obligation of the state's contract with the railroad companies organized under the general law. Although the decisions of this court only held landowners liable for fire set out by negligence, when this charter was granted, still there is nothing in the state or federal constitutions that can restrict the state to those regulations, and those only, existing at the time; but it has the right, in order to guard the property of its citizens along these roads, to adopt new regulations from time to time, as the necessity may require. The state has, and can have, no higher function than the duty to provide for the safety of its citizens and their property. All laws and all charters are passed subject to this duty, wherever it may arise.

Having come to the conclusion that this section in no wise impairs the obligation of the contract made in defendant's charter, we are brought to the next contention,—
 Denial of equal protection of the laws. that defendant is deprived of the equal protection of the law.

That the statute is not open to this serious charge, we think is clear. Defendant is brought into the same courts that are provided for other corporations and natural persons, upon the same process, and the plaintiff is required to make out his case according to the law of the land. If it could be shown that this statute imposes a burden upon railroads from which it exempts others the same or similar circumstances, then it would be open to the criticism that it deprived the railroads of the equal protection of the law. But if the circumstances are different: if no other person, natural or artificial, is authorized to condemn or purchase a narrow strip of land through the lands of others on its route, and to run trains propelled by steam over its road at all times of day or night, and at all seasons, wet or dry, and using engines that scatter fire and burn property, although operated with a degree of care that amounts to "faultlessness," all for its own profit,—then we assert that the statute is not obnoxious to the charge of denying the railroads the protection it

accords to others. So long as the state imposes this duty upon the only agency that has like powers, and creating similar hazards, it cannot be charged with inequality or unjust discrimination. This is a familiar rule in taxation, where uniformity and equality are required by the constitution. The statute applies to all railroads in this state,—a class of carriers operating 133 railroads, with a mileage of 6125 miles, in 1890. If it essayed to render only one road liable, it would be open to the objection; but, as it is, it might as well be said that a statute regulating the practice of medicine, or peddlers, is unconstitutional. This objection was overruled in *Railway Co. v. Emmons*, 56 Am. & Eng. R. Cas. 169, 149 U. S. 364.

The example cited by counsel as a similar case is that of a steamboat operated by steam. Nothing could well be more dissimilar in their surroundings than a railroad and a steamboat. The one is propelled upon the water, upon which the sparks from its smoke-stacks fall, and are instantly extinguished. The other runs along and beside fields full of grain, dry straw, and other highly combustible material, upon which the sparks light, and cinders are blown, at places and at times when it is almost impossible for the owner to be present and guard against the damages. It seems to us the example emphasizes the dangerous exception which railroads constitute to all other persons using steam as a means of transportation.

Finally, is it unconstitutional because it deprives defendant of its property "without due process of law," or in defiance of "the law of the land?"

We accept Mr. Webster's definition of the "law of the land?" "By 'law of the land' is most clearly intended the general law,—a law which hears before it con- Deprivation of property without due process of law. demns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land. If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another,—legislative judgments, decrees, and forfeitures, in all possible forms,—would be the law of the land." "Such a strange construction would render the constitutional provisions of the highest importance completely inoperative and void. Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country."

We cheerfully concede that, if this act comes within this definition, it is our sworn duty to declare it void and inoperative, notwithstanding the high respect we have and owe to the legislative and executive branches of our government, which enacted and approved this act. Let us subject this statute to the test.

At common law, if a person use a highly dangerous machine, he must do so at the peril of the consequences, if it cause injury to others. *Fletcher v. Rylands*, L. R. 1 Exch. 265, L. R. 3 H. L. Cas. 330, and the authorities referred to in Com. Dig. tit. "Action on the Case for Negligence," A 6. But when the legislature expressly authorized railroads in this state, to operate and propel their cars by locomotive engines, it was ruled by our courts that the roads were only liable for negligence in setting out fire upon the premises of adjoining owners in the absence of specific legislation to the contrary.

And here lies the real contention of defendant in this case: It is that it is not competent for the legislature or lawmaking power to attach an absolute liability. We have seen that at common law the liability for fire was absolute. In *Jones v. Railway Co.*, L. R. 3 Q. B. 733, BLACKBURN, J. said: "The general rule of the common law is correctly given in *Fletcher v. Rylands*, L. R. 1 Exch. 265-279, affirmed in house of lords, L. R. 3 H. L. Cas. 330,—that, when a man brings or uses a thing of a dangerous nature on his own land, he must keep it at his peril, and is liable for the consequences if it escapes, and does injury to his neighbor." "Here the defendants were using a locomotive engine, with no express parliamentary powers making lawful that use, and they are, therefore, at common law, bound to keep the engines from doing injury; and if the sparks escape, and cause damage, the defendants are liable for the consequences, though no actual negligence be shown on their part." It took acts of parliament (6 Anne, c. 31, and 14 Geo. III. c. 78) in England to repeal this absolute liability for fire accidentally set out on one's own premises, and extending upon his adjoining proprietor. But, if parliament might repeal, it might also re-enact. By Gen. St. Conn. 1875, p. 489, § 6, one who kindles a fire on his own land is made liable for all damages it may do if it runs upon the land of another, and proof of negligence is not required. A similar statute was passed in Iowa, and sustained in *Conn. v. May*, 36 Iowa, 241.

When the legislature passed the general railroad act giving them the right to use steam, had it also annexed as a condition that the railroad should be absolutely liable for all damages they might cause by fire set out by them, would any one have questioned its power to do so? Had it been done then,

would it not have been a valid exercise of its police power? No violation of the obligation of the contract could be charged in that case, and, if it be a valid exercise of police power, all the authorities, and defendant's counsel, agree that the state is not restricted from asserting it by reason of the prior grant of the charter, for all charters are subject to it.

Does it, then, contravene natural right? Is it open to the indictment preferred by defendant,—that it arbitrarily takes its property, and confers it upon another, without a hearing or consideration? We have seen that it was the ancient common law that the owner was liable for fire escaping from his own premises, whether negligent or not, and that different states in the Union have re-enacted the old common law, by which the owner is now absolutely liable for damage by fire put out on his own premises. Looking for the reason underlying the ancient rule of law, we find that it had its origin in the dangerous character of fire, and that whosoever put this dangerous agency in motion was rightfully required to see that it did no harm; that while it was an elementary principle that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property, the mode of enjoyment was necessarily limited by the rights of others, otherwise it might result in the destruction of their rights altogether. Hence the maxim, "*Sic utere tuo non laedas alienum.*" So that while it has been generally held that one is only liable for negligence, in the prosecution of a lawful business, nothing is more firmly settled than that a man cannot erect a nuisance or employ dangerous agencies, to the annoyance of an adjoining proprietor, even for the purposes of a lawful trade; and it was an old common-law maxim that, where one of two innocent persons must suffer loss from an act done, it is just that it should fall on the one who occasioned the injury, rather than upon the one who had no agency in producing the damage.

Counsel for defendant, in his earnest denunciation of the act as violative of every principle of justice, and indefensible as a police regulation, says: "But we are not aware that this principle of '*Sic utere,*' etc., has ever been extended so far as to make a man liable for the lawful and careful use of his own property."

In *Hay v. Cohoes Co.*, 2 N. Y. 159, the court of appeals of New York had this case before it: The defendant was a corporation chartered by the legislature, and authorized to construct a canal. In the construction of the canal, they resorted to blasting, and threw stone, gravel, and slate upon the house and premises of plaintiff. He brought his action without alleging negligence. The defendant moved for a nonsuit, in-

sisting that it was necessary both to aver and prove negligence and wantonness, and plaintiff had failed to do either. The trial court nonsuited plaintiff. The court of appeals reversed the case, saying: "The defendant had a right to dig the canal. Plaintiff had a right to the undisturbed possession of his property. If these rights conflict the former must yield to the latter as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land than that another should be deprived of the use of his altogether, which might be the consequence of the privilege of the former should be wholly unrestricted."

In *Tremain v. Cohoes Co.*, 2 N. Y., at page 163, the defendants offered to prove "that the work was done in the best and most careful manner." The common-pleas court rejected it as irrelevant, as the declaration neither averred wilfulness nor negligence. The court of appeals sustained the common-pleas court, and held it was not necessary to charge or prove negligence, to recover.

In *McAndrews v. Collerd*, 42 N. J. Law, 189, these two cases in New York were reviewed and approved. In the New Jersey case, the Delaware, Lackawanna & Western Railroad Company was authorized by its charter to construct a tunnel through Bergen hill. It contracted with McAndrews to do the work. The tunnel was driven through rock; was begun in 1873, and finished in 1877. McAndrews constructed near the eastern end of the tunnel, and within the limits of Jersey City, a magazine for explosive materials which he used for blasting. In 1875, at night, the materials exploded, doing damage to property, and, among others, injured Collerd's houses. In a suit by Collerd for damages, it was held: "(1) That the legislative authority to a private corporation or an individual to do work for its or his own profit does not include authority to use, at whatever hazard to the persons or property of others, dangerous materials, even though they are necessary to the convenient prosecution of the work. (2) They will be liable for injury, although no negligence or want of skill in executing the work is proved, and liable for actual damages, even though they show that they have done the work in the most careful manner."

In *Heeg v. Licht*, 80 N. Y. 579, the action was sustained upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with negligence or carelessness. The defendant

had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without apparent cause, exploded and caused the injury. The court says: "The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a personal nuisance." "In such case, the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application." It is significant that the argument employed by the court in that case to show the dangerous character of the magazine, and for that reason to take it out of the rule that exonerates one in a lawful business from liability, save for negligence, is identically the same used by defendant in this case to escape liability. It admits that it uses fire in its engines, and that the utmost care cannot and does not prevent its destroying the property of adjoining proprietors, and yet insists, because it is engaged in a lawful business, it can only be made liable save for negligence. See, also, *Bohan v. Gaslight Co.*, 122 N. Y. 18; *Powder Co. v. Tearney*, 131 Ill. 322.

We think it is clear that, upon the plainest principles of justice, it ought to be liable, and that when experience demonstrated the dangerous character of the locomotive engine, in setting out fire, it was not only the right, but the manifest duty, of the legislature, to hold the railroads liable for fires set out by them, without reference to whether they were guilty of negligence or not. Nor do we think there is any force in the argument that by so doing their property is arbitrarily taken without right. The right to compel them to respond is based upon their use of a dangerous element, and by their destruction of adjoining proprietors' property. Moreover, it is not done in an arbitrary manner. The plaintiff is required to show to a jury or court organized as in any other case that the road did set out the fire; that it did destroy his property; and the jury must, from the evidence, determine the amount of the damage. In no sense is it a finding without a hearing, nor are the essentials to a recovery based upon unreasonable or untenable grounds. In a word, he is simply called upon to respond to a legal duty established by proofs. The wrong done by the dangerous agency set in motion by the company, and under its control, is ample consideration for the compensation it is required by the statute to make the owner whose property it destroy.

But, were it without compensation, it would not follow that the statute would be void. Many instances to the contrary were enumerated in *Boston & M. R. Co. v. York County*

Com'rs, 79 Me. 386, in which it was held that the legislature might lawfully require railroads to fence their tracks, although the act was subsequent to the charter, and although it imposed a burden and expense on the company not existing when it was incorporated. EMERY, J., says, "The wide extent of the police power can be illustrated by instances of its actual exercise without direct compensation." Many of these instances are too familiar to need citations of authorities. He enumerates those cases in which licenses to manufacture liquor have been recalled, and the manufacture prohibited, after much expenditure by the licensees. Beer Co.'s Case, 97 U. S. 33. Lotteries chartered for a consideration paid have been suppressed. Stone's Case, 101 U. S. 814. The various inspection laws, by which dealers are required to pay the inspection fees. Dealers using weights and measures must have them approved, and pay the approving officer. The blameless sufferer from a contagious disease is often compelled to leave home and friends, and bear his pain in some quarantine hospital, and his clothing destroyed, all at his own expense. The right of municipalities to destroy buildings, to prevent spread of fire, in an emergency. The owners of theaters, hotels, and other public buildings are required, at their own expense, to provide fire escapes, and more ample means of exit. Steamboats are subject to inspection, and must pay the fees therefor. Railroads are constantly having imposed upon them additional duties with reference to safety of persons and property. New inventions in brakes, switches; blocking their switches, etc. Pierce, R. R. 462, 463. In this state, the action for damages in case of death was given after many of the old charters were granted, which must have greatly increased the cost of running the road and yet Judge SCOTT says no one questioned that the act was constitutional.

2. But it is contended by the appellant that the legislature never intended to make the fact of the injury anything more than *prima-facie* evidence of negligence; that the circuit court erred in holding that proof of care and diligence on part of the defendant railroad would not relieve it of liability under the statute. If this is all that was in the contemplation of the legislature, it was a work of supererogation, because it has been the settled law of decision in this court since the determination in *Fitch v. Railroad Co.*, 45 Mo. 322 (in 1870), "that, where it is proved that the property was destroyed by fire escaping from the defendant's engine, a *prima-facie* case of negligence is made out; that the burden is then thrown on defendant, by its evidence, to rebut the presumption of negligence by showing the absence of negligence." *Coale v. Rail-*

Relief from
statutory lia-
bility by proof
of diligence
and care.

road Co., 60 Mo. 227; Clemens v. Railroad Co., 53 Mo. 366; Randle v. Railroad Co., 65 Mo. 325; Miller v. Railway Co., 90 Mo. 389, 29 Am. & Eng. R. Cas. 254.

In the light of this judicial history, and of the history of the act itself, we think the legislature meant more than this mere *prima-facie* liability. Section 2615 is a rescript of the Massachusetts act. That act had been adopted in other New England states and in Iowa, and a construction given it that rendered the railroad companies liable, independent of the question of negligence, for damages occasioned by fires set out by them. It is a familiar rule of construction in this state that when the legislature enacts a statute which is a transcript of a statute of another state, that has received a known judicial construction by the courts of that state, it is deemed that our legislature adopted that construction as an integral part of its act. State v. Macon County Court, 41 Mo. 453; Skouten v. Woods, 57 Mo. 380; West v. McMullen, 112 Mo. 405; Rodemacher v. Railroad Co., 41 Iowa, 297; Grissell v. Railroad Co., 54 Conn. 447; Railway Co. v. De Busk, 12 Colo. 294, 38 Am. & Eng. R. Cas. 321; Hooksett v. Railroad Co., 38 N. H. 242; Rowell v. Railroad Co., 57 N. H. 132; Lyman v. Railroad Corp., 4 Cush. 288. We are confirmed in our views by the reasoning of the learned judge in Small v. Railroad Co., 50 Iowa, 338. He shows that in Iowa the court had not, previous to the statute, held the fact of the fire *prima-facie* evidence of negligence, and the language of the statute is made the turning point. Nothing, however, said in that case, in our opinion, destroys the force of Judge DAY's decision in Rodemacher v. Railroad Co., 41 Iowa, 297.

3. Appellant complains of a ruling of the court in excluding certain evidence. It offered to prove by Howard Blossom, an insurance agent, that trees, shrubs, plants, and vines were, by their inherent nature, not susceptible of insurance, and it was impracticable from a business standpoint, to insure such classes of property, and why it is so impracticable.

Non-insurable
nature of prop-
erty destroyed
as affecting
right of owner
to recover.

Upon objection that this evidence was immaterial and irrelevant, the court excluded it, and defendant excepted. It is not contended by defendant that "trees, shrubs, plants, and vines" are not property, often of great value, and that, as such, they would not be included in the general term "property," used in the statute, but it urges that such property is not insurable. Its offer was to show that the inherent nature of such property is uninsurable. The act under consideration is not limited to any specific property. It is broad enough to include both real and personal property. The statute is an enabling act. By its terms the property becomes

a subject of insurance. The mere fact that no person has as yet applied for insurance upon growing timber and ornamental shrubs would not meet the case. This character of property is of inherent value, adds greatly to the value of realty, and certainly is not more subject to change than ordinary personal property, which is clearly insurable. That this class of property is subject to destruction by fire, all must admit, and no valid reason appears why it may not be insured. We take it that it is not an open question, under this statute, and no error was committed in declining to hear the evidence offered. The judge and jury would be as competent to respond to that question as any witness. Such property was held clearly within a similar statute in Maine, and insurable, in *Pratt v. Railroad Co.*, 42 Me. 579,—a case much later than that cited by defendant from 37 Me. 92, and following *Hart v. Railroad Co.*, 13 Metc. (Mass.), 99. Chief Justice BIGELOW, in *Ross v. Railroad Co.*, 6 Allen, 37, pointed out the difficulties in which the supreme court of Maine has become involved by attempting to confine the right of recovery to permanent property, and repudiated any such limited construction. He maintained that the statute was broad enough to cover every species of property, and the claim for indemnity was as strong in one as in the other. The evidence, if permitted, would have led to a distinction unauthorized by anything in the statute, which is remedial in its nature, and not to be strictly construed against those for whose benefit it was enacted. It becomes unnecessary to say more in regard to the point that the personal property in the house was not insurable. The personal property that was burned was stored in the residence and barn, and no reason is given why it was not insurable. The defendant's point as to this is not sustained.

4. On the trial, defendant introduced witnesses who testified that they lived in the neighborhood of the Mathews home-place; that it had been neglected for years prior to August 9, 1887, and no care taken of it, except to mow the meadow and lawn around the house; that the garden, nursery, and orchard had been permitted to grow up in weeds, some of which were two or three years old, and on the day of the fire were very dry; that the place was the resort for boys, who frequented it to swim in the pond, and in the fall, to hunt; that the weeds and inflammable material at the southeast corner, near the nursery, ran right down to the defendant's right of way.

At the conclusion of the evidence, defendant asked two instructions to the effect that the conduct of plaintiff in per-

Contributory
negligence—
Allowing dried
weeds to re-
main on ad-
joining lands.

mitting these weeds to grow on his place, as above testified, constituted such contributory negligence as would prevent plaintiff's recovery, or, if such weeds augmented the loss, he could only recover for so much of the injury as would have followed, had he not been negligent in that regard. The circuit court declined to give either of said instructions, and defendant complains of that ruling. The instructions are predicated on the fact that the jury should first find that the fire was communicated by defendant's engine to this grass or weeds, but assumes that it was contributory negligence in plaintiff to permit these weeds to grow upon his land in this manner.

This question has often been before this court, beginning with *Fitch v. Railroad Co.*, 45 Mo. 322; and it has uniformly been ruled that it was not contributory negligence in a farmer to permit dead and dry grass to remain in his fields adjoining the right of way, "especially," as was said in *Patton v. Railway Co.*, 87 Mo. 117, 23 Am. & Eng. R. Cas. 364, "when there is no evidence that this is out of the usual course of husbandry." These decisions of this court are amply supported by both reason and authority in other states. In *Railroad Co. v. Medley*, 75 Va. 499, 7 Am. & Eng. R. Cas. 493.

Judge WALLER R. STAPLES delivered the opinion of the court. It appeared in that case that the plaintiff's land was covered with dry grass and broom-sedge; that this grass was of a highly combustible nature, and easily ignited. The point was made that plaintiff was guilty of contributory negligence, but the court held otherwise, saying: "The legislature, in legalizing the use of engines running through the country, scattering fire and cinders on all sides over lands in the vicinity of the road, certainly did not intend to impose any additional burdens or duties upon the owners of such lands." "They are subject only to such risks as are necessarily incidental to the proper and legitimate operation of the road by those having charge of it." "Any other rule would impose upon property-holders near the line of a railroad the necessity of removing their grain, hay, and whatever is of a combustible nature, to some distant point,—not infrequently, of changing the whole course of husbandry, of incurring enormous expenses, and of exercising ceaseless vigilance,—in order that the company may negligently permit the accumulation of dangerously inflammable matter upon its own lands, liable at any moment to be ignited from its own locomotives." "It has been well said that fire is an extremely dangerous element, even when employed for a lawful purpose. The exercise of due care is imposed on him who uses it, and

sets it in motion for his own advantage, and not upon him who is merely passive, confining himself to lawful employment and business in the conduct of his own affairs." "There are some few cases holding a contrary doctrine, but the great weight of authority is in conformity with the views here expressed. I refer particularly to an exhaustive discussion of the whole subject by Chief Justice DIXON in *Kellogg v. Railroad Co.*, 26 Wis. 223; also, to a very able opinion of Judge HAYMOND in *Snyder v. Railway Co.*, 41 W. Va. 14; *Salmon v. Railway Co.*, 38 N. J. Law, 5, and 39 N. J. Law, 299."

In *Railroad Co. v. Schultz*, 93 Pa. St. 341, 2 Am. & Eng. R. Cas. 271, the supreme court of Pennsylvania characterized the claim of defendant that plaintiff was guilty of contributory negligence because he permitted dry leaves, brushwood, and other rubbish on his property, which could be readily fired by sparks from its locomotive, as "an extraordinary proposition," assigning, among other reasons, that "it was an attempt to impose upon property-owners along the line of a railroad duties unknown and unnecessary before the building of the road," and, "if this proposition means anything, it means that upon such property-owners devolves the duty of guarding against the negligence of railroad companies and their servants, which is absurd;" and citing Judge AGNEW's opinion in *Railway Co. v. Hendrickson*, 80 Pa. St. 182. See, also, *Railroad Co. v. Jones*, 86 Ind. 496; 11 Am. & Eng. R. Cas. 76; *Vaughan v. Railroad Co.*, 3 Hurl. & N. 750; *Railway Co. v. Hixon*, 79 Ind. 111, 8 Am. & Eng. R. Cas. 717.

It will be observed that defendant's own witnesses testified to the mowing of the grass and meadow, and the only accumulation was in the nursery, garden, vineyard, and orchard. As remarked in *Patton's Case*, *supra*, there was no evidence whatever that it was not customary, or even proper, at times, to let weeds grow. Certainly, it cannot be affirmed that weeds, even, are not often put to a most useful purpose, in mulching and manuring. In any aspect of the case, we think there was nothing showing contributory negligence by the plaintiff.

But there is another ground upon which this plea should have been denied, and that is, by virtue of section 2615, the defendant is made an insurer against fire set out by its engines, and it is a familiar rule that contributory negligence, short of fraud, does not furnish any defense to an action by the insured on his policy of insurance, and this was the view taken and enforced in *Rowell v. Railroad Co.*, 57 N. H. 132.

Degree of contributory negligence which will defeat recovery.

5. In this connection we are called upon to consider the

position taken by defendant in the fourth paragraph of its answer, which is, in brief, that, at the time of the fire, plaintiff was insured in certain insurance companies to the amount of \$10,000; that, after said fire, said companies paid said loss of \$10,000. Wherefore, defendant prays that the insurance-money so paid to plaintiff by said insurance companies shall be applied *pro tanto* to the damages sued for in this case. The defendant is most clearly not entitled to any benefit of the insurance-money which accrued to plaintiff by reason of defendant's own act in destroying the insured property.

Abatement of recovery to extent of insurance moneys received by owner of destroyed property.

In *Dillon v. Hunt*, 105 Mo. 154, 16 S. W. 516, this division held the rule as stated in 1 Suth. Dam. 242 (Ed. 1882), to be correct, viz.: "That there can be no abatement of damages on the principle of partial compensation received for the injury, when it comes from a collateral source, wholly independent of the defendant, and is, as to him, *res inter alios acta*. The payment of such moneys not being procured by the defendant, and they not having been paid or received to satisfy in whole or in part his liability, he can derive no benefit therefrom, in mitigation of damages for which he is liable. To permit a reduction on such a ground would be to allow a wrongdoer to pay nothing, and take all the benefit of a policy of insurance without paying the premium." A similar conclusion had previously been reached in *Carroll v. Railway Co.*, 88 Mo. 239, 26 Am. & Eng. R. Cas. 268, to which our attention was not called at the time. Although an insurer, defendant, not having itself destroyed the property, has no right to share the immunity afforded other insurers. Their relation as to this loss is entirely antagonistic to it. The defendant's liability is first and principal; that of the insurance companies, secondary. Plaintiff and the insurance companies who paid his loss stand opposed to defendant, who was the cause of loss to both. There is no contractual relation or principle of subrogation that will enable defendant to require of them that they shall share their losses *pro tanto* with it. The statute points out the way by which it may protect itself against the loss. It confers on it an insurable interest in the property, and only by availing itself of this right can it guard against those losses which occur by fires put out by it on the lands of adjoining owners. *May, Ins. § 455*; *Harding v. Townshend*, 43 Vt. 536; *The Monticello v. Mollison*, 17 How. 152; *Hammond v. Schiff*, 100 N. Car. 161; *Hart v. Railroad Co.*, 13 Metc. (Mass.), 105; *Ross v. Railroad Co.*, 6 Allen, 90.

6. At the trial, defendant offered to prove that its right of

way was a portion of the property described in plaintiff's petition; that when its railroad was built through plaintiff's premises, in 1882, condemnation proceedings were instituted against plaintiff, to which he was made a party; that before the commissioners appointed to assess plaintiff's among other items of damage caused by defendant's road, plaintiff claimed, as one, "damage of fire for all time to come." Defendant then offered to show by H. W. Hough and W. T. Essex, two of said commissioners, that they awarded plaintiff, for his damages to all his property, \$9000, and for this home-place they assessed the damage at \$3000; that in estimating the damage they took into consideration the danger to said property from accidental fire set out by engines on the railroad; that plaintiff and defendant finally agreed to abide the award, and the damages were accordingly paid.

The court was requested to charge the jury, in the second instruction prayed by defendant and refused by the court, that if the commissioners did assess the damages, and in so doing took into consideration the danger to plaintiff's property by accidental fire, and said danger was also considered by plaintiff and defendant, then plaintiff cannot recover, provided such proceedings and compromise were had prior to March 31, 1887. When a part of a tract of land is taken for railroad purposes under condemnation proceedings, the jury or commissioners may properly take into consideration the risk from fire to the buildings, fences, timber, or crops upon the remainder, in so far and to the extent, only, that it depreciates the value of the property; but compensation for a probable or future loss by fire is entirely too speculative and remote to be made the basis of damages. As said in *Railway Co. v. McGrew*, 104 Mo. 282, loc. cit. 294: "It would not be proper to estimate the possible damage from fires or injuries to persons." "Neither may ever occur, and to take them into the estimate would be mere speculation." "We think they may properly be considered, however, in so far as they tend to depreciate the value of the whole property, and to affect the proposed changes, but no further." *Lewis*, Em. Dom. § 497; *Mills*, Em. Dom. §§ 163-166; *Railroad Co. v. McComb*, 60 Me. 290; *Adden v. Railroad Co.*, 5 N. H. 413; *Railway Co. v. McCloskey*, 110 Pa. St. 436.

The plaintiff's claim before the commissioners was damage from the risk of fire. In so far as that risk affected the value of his property not taken, by depreciating it, it was a proper claim. There was nothing to show that it was unjustly extended to an estimate of damages that might accrue at some

Allowing for
damage by fire
in proceedings
to condemn
land.

future time, or might never occur. The damages assessed were \$3000, and paid.

After the assessment, then, plaintiff held his property in its depreciated condition. How defendant can arrive at the conclusion that if this property, in its depreciated condition, is subsequently destroyed, plaintiff is not entitled to recover whatever damages shall accrue from such subsequent destruction, we cannot understand. The prior condemnation assessment has been made and settled. After that, plaintiff owns what is left, absolutely, as he owned the whole before a portion was appropriated by the road. The subsequent damages constitute no part of the first. It is not double damages, in any sense, as we view it. If the property is destroyed by negligence, there can be no question of the liability of the company for burning it, nor is it material, under section 2615, whether it was the result of negligence or pure accident. The statute operates upon the estate as it is when the fire occurs, and, as we hold the statute valid, the company is liable. *Railroad Co. v. McComb*, 60 Me. 290; *Adden v. Railroad Co.*, 55 N. H. 413; *Grissell v. Railroad Co.*, 54 Conn. 447; *Pierce v. Railroad Co.*, 105 Mass. 199; *Lyman v. Railroad Corp.*, 4 Cush. 288.

We find no error in the judgment of the circuit court, and accordingly affirm it.

BURGESS, J., concurs.

SHERWOOD, J., dissents.

Statutes Imposing Direct Liability for Fires.—See *Martin v. New York & New England R. Co.* (Conn.), 56 Am. & Eng. R. Cas. 79, and note, 85.

Right of Railroad Company to Claim Reduction of Damages on Account of Insurance on Property Destroyed or Injured.—See *Reegan v. New York & New England R. Co.* (Conn.), 49 Am. & Eng. R. Cas. 590.

Danger from Fire as an Element of Damage in Eminent Domain.—See *Kansas City & Emporia R. Co. v. Kregulo* (Kan.), 20 Am. & Eng. R. Cas. 241, and note 246; *Ontario & Quebec R. Co. v. Taylor* (Can.), 17 Am. & Eng. R. Cas. 100, and note, 106.

Constitutionality of Statutes Imposing Liability on Railroad Companies for Fires Communicated by them—*Colorado Statute.*—In *Union Pac. R. Co. v. Tracy*, 19 Colo. 331, it was held that Gen. Stats. § 2798, imposing upon railroad companies liability for losses sustained by fires originating by the operation of their lines, was constitutional. *Following Railway Co. v. De Busk*, 12 Colo. 294, 38 Am. & Eng. R. Cas. 321.

Missouri Statute.—In *Adams v. St. Louis & S. F. R. Co.* (Mo., Dec. 4, 1894), 28 S. W. Rep. 496, it was held that the act of March 31, 1887 (Rev. Stat. 1889), entitled "An act to establish the responsibility of railroad corporations, companies, or persons operating railroads, for damages communicated by locomotive engines," is not illegal, unconstitutional, or void, in that it seeks to deprive railroad companies of their property without due process of law, or denies to them the equal protection of the laws contrary to the provisions of the fourteenth amendment to the constitution of the

United States, nor does the act impair the obligation of a contract made between the state and the company by the terms and provisions of which, it was agreed that the company might and could use fire for the purpose of generating steam to propel locomotive engines, and cars attached thereto, and that it should be responsible only for the negligence and careless use thereof.

South Carolina Statute.—Gen. Stats. South Carolina § 1511, imposing on railroad companies an absolute liability for damages sustained by fires communicated by their locomotives is constitutional. *McCandless v. Richmond & D. R. Co.*, *post*. *Lipfeld v. Charlotte, C. & A. R. Co.* (April 19, 1894), 19 S. E. Rep. 497; *Hunter v. Columbia, N. & L. R. Co.* (Mar. 14, 1894), *Id.* 197; *Mobile Ins. Co. v. Columbia & G. R. Co.* (June 25, 1894), *Id.* 858.

Fires—Contributory Negligence—What Constitutes—Leaving Cotton on Railroad Platform Exposed to Danger of Ignition by Passing Engines.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that the acts of an owner or shipper of cotton and a compress company, in leaving cotton on a platform where it was liable to ignition from passing engines, was such contributory negligence, as would preclude a recovery notwithstanding the negligence of the railroad company.

Ordinary Use of Land by Owner.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, which was an action against a railroad company to recover for loss by fire alleged to have been communicated by the locomotive of a railroad company, it was held that the plaintiff was not negligent in using his land and property in the same manner, or in permitting it to be used and remain in the same condition as it would have, had no railroad passed through it.

Duty of Owner to Take Precautions Against Fire.—In *Omaha Fair & Exp. Assn. v. Missouri Pac. R. Co.* (Neb., Oct. 2, 1894), 60 N. W. Rep., it was held that the owner of land cannot be deprived of the free enjoyment of his property by the construction of a railroad adjacent thereto, and therefore his failure to take unusual precautions against its destruction by fires negligently set out by the railroad cannot be urged as a defense to an action to recover for such loss; nor can contributory negligence in such cases be predicated upon his proper use of his property in the usual manner, but the obvious hazard of fires is a fact which he cannot disregard, and he is bound to take such precautions as a person of ordinary prudence would take for the protection of his property, not against anticipated negligence of the railroad, but against such obvious hazards. The court said: "Some cases, of which *Railroad Co. v. Medley*, 75 Va. 499, 7 Am. & Eng. R. Cas. 493, is an illustration, go to the full length of the doctrine contended for by plaintiffs, and hold that the construction of a railroad imposes no additional duty on the owner of adjacent land, and requires him to take no precautions whatever to avoid injury by fire. A somewhat modified but similar doctrine is inferable from the case of *Railroad Co. v. Jones*, 86 Ind. 496. Nearly all of the modern cases asserting this doctrine cite the case of *Kellogg v. Railway Co.*, 26 Wis. 223. But in *Murphy v. Railway Co.*, 45 Wis. 222, this case was explained as holding only that, under the facts thereof, the court was right in refusing to charge that the plaintiff was guilty of contributory negligence as a matter of law; and in the latter case, and in *Clune v. Railroad Co.*, 75 Wis. 532, it was held that similar facts should go to the jury. The expressions in the opinion in *Kellogg v. Railway Co.*, so far as they extended beyond the rule that negligence *per se* had not been shown, were distinctly disapproved.

"In a large class of cases the rule is asserted that a landowner cannot be charged with contributory negligence where he uses his property in the

usual course for the purpose for which it is adapted. *Patten v. Railroad Co.*, 87 Mo. 117, 23 Am. & Eng. R. Cas. 364; *Kalbfleisch v. Railroad Co.*, 102 N. Y. 520, 29 Am. & Eng. R. Cas. 179; and *Railroad Co. v. Hendrickson*, 80 Pa. St. 182, are illustrations of this rule.

"In a larger number of cases, however, it has been held that facts somewhat similar to those charged against the plaintiffs would constitute evidence of contributory negligence, which should be submitted to the jury. *Railway Co. v. Brady*, 17 Kan. 380; *Railroad Co. v. Owen*, 25 Kan. 419, 6 Am. & Eng. R. Cas. 611; *Railway Co. v. Cornell*, 30 Kan. 35, 11 Am. & Eng. R. Cas. 56; *Garrett v. Railway Co.*, 36 Iowa, 121; *Slossen v. Railroad Co.*, 60 Iowa, 215, 11 Am. & Eng. R. Cas. 67; *Bryant v. Railroad Co.*, 56 Vt. 710; *Karsen v. Railway Co.*, 29 Minn. 12, 7 Am. & Eng. R. Cas. 501; *Railroad Co. v. Nunn*, 51 Ill. 78; *Railroad Co. v. Simonson*, 54 Ill. 504. In *Railroad Co. v. Westover*, 4 Neb. 268, it was held that the failure of the plaintiff to plow fire-breaks about his premises did not constitute contributory negligence, the court saying: "All take risk of injuries unavoidably produced by the use of fire for the purpose of generating steam, but upon what authority is any one to be deprived of the free and ordinary use of his property, in order to prevent its destruction by the negligent use his neighbor may make of his? I know of no such authority." In the same case it was held that the fact that the railroad company permitted dry grass and rubbish to remain on its land was one from which the jury might infer negligence. As applied to the facts of that case, the correctness of this decision cannot be doubted. The construction of a railroad near one's premises does not require one to forbear the ordinary use of his land, nor does it require him to take unusual precautions to guard against the consequences of probable negligence on the part of the railroad. But a railroad company is liable for losses caused by fires set out only when the fires are set out by its negligence. In spite of the utmost precautions fires may arise: and while the owner of adjacent land need not fortify himself against negligence merely to be anticipated, and not yet committed, still, especially as fires are not necessarily the result of negligence, he should be required to take such precautions as a person of reasonable prudence would, under similar circumstances, to prevent the destruction of his property. This rule does not deprive him of the beneficial enjoyment of his property, any more than in any other cases of negligence. It would probably be under very exceptional circumstances that he would be required to do any affirmative act for his protection; but to hold that, with knowledge of the danger, he may place combustible materials in such a manner as to invite the spread of any fire which may be set out, and, notwithstanding such act, recover, would be to establish a rule wholly foreign to the spirit of our law, and as unjust as it would be unique. Here the evidence tended to show that the fair association actually went off of its own property, and performed acts which resulted in the accumulation of combustible matter near the tracks of the defendant, and between those tracks and the fair-grounds. This was certainly sufficient evidence to submit to the jury, under the well-settled rule in this state, and the court did not err in so doing."

Extension of Building into Railroad Location—License of Company.—In *Sherman v. Maine Cent. R. Co.* (Me., May 21, 1894), 30 Atl. Rep. 69, it was held that the fact that a building in which goods are kept or stored extends a few feet into the location of a railroad, if placed there or permitted to remain there by license of the railroad company or its officers, will not exempt the company from liability for injuries to the goods by fires communicated by its locomotive engines.

CAMPBELL

v.

MISSOURI PACIFIC R. Co.

(121 *Missouri*, 340.)

Constitutionality of Act of March 31, 1887, Imposing Absolute Liability on Railroad Companies for Fires Set by Their Locomotives.—The act approved March 31, 1887 (Rev. Stats. 1889, § 2615), establishing the liability of railroad companies for property injured or destroyed by fires set by their locomotives, without proof of negligence, is constitutional. *Following Mathews v. St. Louis & S. F. Co. ante p. 432.*

Action to Enforce Statutory Liability—Effect of Charging Negligence in Petition.—The fact that a petition in an action to recover under the statute unnecessarily charges negligence, will not prevent a recovery under the statute without proof of negligence.

Same—Admissibility of Proof of Other Fires Set by Engines of the Company at Other Points on Its Line.—Proof that other fires prior and subsequent to the one alleged to have caused the injury complained of, at different places along the line of the defendant's road, had been set by sparks from defendant's engine, was admissible, since the proof as to the fire was substantial, and no pretense was made that the engine alleged to have set the fire was materially different from any others used by the defendant on its road.

Liability of Company for Destruction of Non-Insurable Property.—Under the statute in question, a railroad company is liable for the destruction by fire of such personalty, shrubs, trees and flowers in which an interest is not insurable, notwithstanding that the statute gives the railroad companies an insurable interest in property along its route.

SHERWOOD, J., dissenting.

APPEAL from Moniteau circuit court.

H. S. Priest and Wm. S. Shirk, for appellant.

Edwards & Davison and Draffen & Williams, for respondent.

MACFARLANE, J.—This is an action to recover damages, as alleged, by the burning of plaintiff's building, fences, shrubbery, etc., by fire communicated from one of defendant's locomotives. The petition charged negligence on the part of defendant in permitting fire to escape. *Case stated.* The answer was a general denial.

It is agreed by counsel that the evidence, though circumstantial, tended to prove that the fire which consumed plaintiff's property was communicated from one of defendant's engines while being operated on its road. The court per-

mitted a recovery under section 2615 of the Revised Statutes, without proof of negligence on the part of the defendant.

I.—The first proposition insisted upon as ground for reversal of the judgment is that said section 2615, which makes every person and corporation responsible in damages for property injured or damaged by fire communicated, directly or indirectly, by locomotive engines in use upon their railroads, without proof of negligence, is unconstitutional. This objection has

Constitution-
ality of
statute.

received the careful consideration of this court in banc at this term in the case of *Mathews v. Railway Co.*, 121 Mo. 298, in which the statute in question was held valid. The objection under the authority of that case must therefore be overruled.

It may not be out of place here to take the occasion of stating that, in my opinion, the statute can be sustained on the broad ground that it is merely remedial in its character, and is authorized under the general powers of the legislature to provide appropriate remedies for the redress of such wrongs as are contemplated. "The remedy does not alter the contract or the tort. It takes away no vested right, for the defaulter can have no vested right in a state of the law which left the injured party without, or with only a defective, remedy." End. Interp. St. § 285.

It is unquestioned that the utmost diligence and care cannot prevent the escape of fire from locomotive engines. We have, then, this condition of things: The corporation is given the right, by the statute, to run its engines by steam power, necessitating the use of fire. Fire necessarily escapes, and is scattered along the route. The citizen owns property on the line of the road, which is exposed to fire from those engines, regardless of the care and vigilance he may exercise. Both parties are faultless, but nevertheless the property of the owner is consumed by fire from an engine. The property owner has the right to own the property, and to claim protection under the law, equal, at least, to the right of the corporation to use fire on its engines. The loss must necessarily fall upon one or the other of these parties. Which one of them shall suffer the loss,—the one through whose agency the damage was caused, though in the lawful use of its own property, or the one equally innocent of wrong, and who had no agency in causing the damage? Tested by the rule of natural right and equity, there could be but one answer to the inquiry. This answer is formulated into the maxim that "every one should so use his own property as not to injure that of his neighbor."

Prior to the statute under consideration, the loss was made to fall upon the owner who was innocent of fault in the use

and care of his own property, and had no part in setting at liberty the destructive agency. The rule was manifestly unjust. To change this rule, and place the liability where it should rest, is the purpose of the statute. In the language of DEWEY, J., in *Lyman v. Railway Co.*, 4 Cush. 290, we consider the statute "as one of those general remedial acts passed for the more effectual protection of property against the hazards to which it has become subject by the locomotive engine. The right to use the parcel of land appropriated to the railroad does not deprive the legislature of the power to enact such regulations, and impose such liabilities for injuries suffered from the mode of using the road, as the occasion and circumstances may justify." The statute considered in that case imposed on the railroad company absolute liability for damages caused by fires escaping from engines.

So, in a recent case in Connecticut, the court, in discussing a similar statute, says: "In this view of the case, the statute rests upon broad grounds of justice and equity. It is designed to do justice where before there was a partial failure of justice. It is therefore a 'remedial statute,' in the best sense, and we must so construe it as to suppress the mischief and advance the remedy." *Martin v. Railroad Co.*, 62 Conn. 340, 56 Am. & Eng. R. Cas. 79.

The contract between the state and the corporation is that the latter may propel its trains by the use of steam generated by fire. There was no agreement that it should be exempt from liability for the consequences resulting to others from its use of fire. In respect to such consequences it is subject to control by remedial laws to the same extent as natural persons. Fire, when uncontrolled, is necessarily destructive of property. As shown in the opinion of GANTT, J., in the *Mathews Case*, *supra*, damage caused by fire was recoverable at common law without proof of negligence. There is no reason why the common law could not, or indeed should not, be restored in cases in which the lawful use of property by one necessarily exposes the property of others to damage by fire.

A statute of this state declared that "if any person shall wilfully set on fire any woods, marshes, or prairies, so as thereby to occasion any damage to any other person, such person shall make satisfaction for such damage to the party injured, to be recovered in an action on the case." Rev. St. 1845, p. 1091, § 3. This act came before this court in 1848, and its validity was not questioned, though that distinguished jurist, LEONARD, afterwards judge of this court, represented the party charged with the damage, and a recovery without proof of negligence was affirmed. In that case the court held that the fact that the fire was set on defendant's land constituted no defense

under the statute. *Finley v. Langston*, 12 Mo. 123. A similar statute was held valid by the supreme court of Iowa. *Conn v. May*, 36 Iowa, 241.

We think there can be no doubt that the state has the power to impose absolute liability upon one causing loss of property to another by the use of agencies necessarily destructive, and in the use of which absolute control is impossible, whether the one using the agency be a private person or a corporation.

II. The petition charged that the fire causing the injury was permitted to escape through the negligence of defendant, and the court permitted a recovery under the statute without proof of negligence. Defendant assigns this action of the court as error, in that it permitted a recovery upon a cause of action different from that charged in the petition. The petition states all the facts necessary to authorize a judgment under the provisions of the statute, and, in addition thereto, the allegation of negligence. By the statement of more than was required, plaintiff did not forfeit his right to recover upon proof of the facts he was required to state, and did state, in his petition. *Radcliffe v. Railway Co.*, 90 Mo. 131; *Morrow v. Surber*, 97 Mo. 155.

Effect of charging company with negligence.

III. During the trial, witnesses were permitted to testify, over the objection of defendant, that other fires, both before and subsequent to the one in question, at different places on the line of defendant's road, had been started by sparks from some of defendant's engines. The admission of this evidence is assigned as error.

Proof of other fires set by engines.

In *Coale v. Railway Co.*, 60 Mo. 227, this court held that, in order to prove that one engine was insufficient, or that the employés of the company in charge of such engine were careless or incompetent, evidence was not admissible to prove that other engines were defective, and other employés were incompetent or negligent. The ruling in that case is not controlling on the question of the admissibility of the evidence complained of here, for the reason that the statute creates an absolute liability, without respect to the character of the machinery or the competency of the employés. The admission of the evidence was clearly harmless if it only tended to prove want of care on the part of defendant.

The only issue involving the liability of defendant was whether the fire was communicated to plaintiff's property, directly or indirectly, by a locomotive engine in use upon its road. Was this evidence admissible as tending to prove that issue? The question was sharply contested on the trial

whether the fire causing the damage did, in fact, originate from one of defendant's engines. The evidence was all circumstantial. It was important, then, to show that there was a possibility that sparks may have been thrown a distance sufficient to reach the building in which the fire originated, and that they contained heat enough to set it on fire. The facts that live sparks were thrown from engines, and did ignite grass and other combustible material, would tend to prove the probability that the fire was communicated from an engine. It was not shown that the engine from which alone the fire could have been communicated was constructed or manned with more care than all others in use on the road. The admissibility of such evidence was affirmed in *Sheldon v. Railroad Co.*, 14 N. Y. 223, by a divided court.

The court in that case says: "The competency of this evidence has been directly decided in the English court of common pleas. *Piggot v. Railway Co.*, 10 Jur. 571; *Aldridge v. Railway Co.*, 3 Man. & G. 515. These cases upon this point are well decided. The principle is essential in the administration of justice, inasmuch as circumstantial proof must, in the nature of things, be resorted to, and inasmuch as the jury cannot take judicial cognizance of the fact that locomotive engines do emit sparks and cinders, which may be borne a given distance by the wind. The evidence was competent to establish certain facts which were necessary to be established in order to show a possible cause of the accident, and to prevent vague and unsatisfactory surmises on the part of the jury." This ruling was followed without division in *Field v. Railway Co.*, 32 N. Y. 339, and *Webb v. Railway Co.*, 49 N. Y. 421.

A similar ruling was made by the supreme court of the United States in *Railroad Co. v. Richardson*, 91 U. S. 470. Mr. Justice STRONG, who wrote the opinion of the court, says: "The question has often been considered by the courts of this country and in England; and such evidence has, we think, been generally held admissible, as tending to prove the possibility, and consequent probability, that some locomotive caused the fire." He follows this statement of the law by a number of citations, both English and American, including the case of *Sheldon v. Railroad Co.*, *supra*.

Further on in the same opinion the judge says: "The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us that, under the circumstances, this probability was strengthened by the fact that some engines of the same defendant, at other times during the same season, had scattered fire along their passage." To the same effect are the following cases:

Smith v. Railroad Co., 63 N. H. 25; Railroad Co. v. Gilbert, 3 C. C. A. 264, 52 Fed. Rep. 711; Thatcher v. Railroad Co., 85 Me. 509.

We think the evidence tended to prove the possibility, and consequent probability, that the fire was communicated to plaintiff's property from one of defendant's engines, and that the evidence was admissible, and its probative force was for the determination of the jury. If the issue had been of negligence in the construction or management of the engine only, and the engine which could only have caused the damage had been clearly identified, evidence that other engines emitted sparks and set fires would have been inadmissible under the decisions of this court. Coale v. Railway Co., *supra*; Patton v. Railway Co., 87 Mo. 117, 23 Am. & Eng. R. Cas. 364. But, in case the fact whether the fire originated from the engine was alone in issue, and there was no direct proof of the fact, it seems very clear that such evidence would have some tendency to prove that issue. The evidence was all circumstantial, and the facts testified to were circumstances, though slight they may have been, bearing upon the issue.

IV. Defendant insists, further, that plaintiff was not entitled to recover under the statute for personal property burned, nor for shrubs, trees, and flowers, upon which defendant could not obtain insurance. For support of this contention, counsel cite Chapman v. Railroad Co., 37 Me. 92. The loss considered in that case was of a lot of cedar posts temporarily deposited near the road. The statute made the railroad responsible "when a building or other property is injured by the fire communicated by a locomotive engine" and gave to the corporation "an insurable interest in the property along the route for which it is responsible." After discussing the statute, the court says: "The conclusion to which we have arrived is that the liability of railroad corporations under this statute extends only to property permanently existing along their route, and capable of being insured, and that as to movable property, having no permanent location, the liability of such corporation is to be determined by principles of the common law." In Pratt v. Railroad Co., 42 Me. 579, the same court held that the liability of the company under this statute was not confined to real estate, but extended to personal property as well.

Right of recovery for destruction of non-insurable property.

Exemption from responsibility under the statute of that state has never extended beyond injury to movable property temporarily placed near the track. In the recent case of Thatcher v. Railroad Co., *supra*, the supreme court of that state very evidently disapproves the decision in the Chapman

Case, though it expressly states that it had no intention of overruling it.

The court agreed that a different construction of the statute had been given by the courts of Massachusetts, Vermont, and New Hampshire from the one declared in the Chapman Case.

We do not think so narrow a construction should be given our statute. It is remedial, and such construction should be given it as will advance the remedy. Indeed, the language of the statute is so plain and unambiguous as to admit of but one construction. The corporation shall be responsible "to every person or corporation whose property may be injured or destroyed." This language leaves no room for discussion as to the character of the property contemplated; it includes all property that may be injured or destroyed. We do not think it necessary to the validity of the statute that the railroad corporations should have been given an insurable interest in the property upon the route of their roads; nor does the fact that such interest was given limit their responsibility to insurable property that may be injured or destroyed. The purpose of the law was to give the corporation the same right and opportunity of protection and indemnity from fires as the owner of the property had. What property is the subject of insurance must be determined by the insurance companies, whether the indemnity is sought by the owner or by the corporation.

Judgment affirmed.

SHERWOOD, J., dissents.

BARCLAY, J., absent.

The other judges concur.

Constitutionality of Statutes Imposing Absolute Liability for Fires.—See *Mathews v. St. Louis & S. F. R. Co.*, *ante*, p. 432, and note.

MATTOON

v.

FREMONT, ELKHORN & MISSOURI VALLEY R. CO.

(*South Dakota Supreme Court, Sept. 1, 1894.*)

Action against Railroad Company for Negligently Allowing Fire to Spread—Admission of Acts of Servants in Answer—Necessity of Proof.—When the plaintiff in his complaint alleges that the defendant, by its servants, on a certain day set a fire on defendant's right of way for the purpose of burn-

ing off combustible material thereon, and defendant in its answer sets up substantially the same, the fact that the persons setting the fire were the servants of the defendant, and were acting within the scope of their authority, is admitted, and evidence to prove the same is not required on the trial, when the general denial is that the defendant denies each and every allegation of the complaint which is not thereafter specifically admitted or qualified.

Same—Necessity of Affirmative Proof of Negligence.—Where a party makes a fire upon his own land for a lawful purpose, and the fire spreads to other land, the person complaining thereof must affirmatively prove negligence, of which the fire itself is no evidence.

Same—Burden of Proof.—The gist of an action in such a case is negligence, and the burden of proof to show such negligence is upon the plaintiff; and in the absence of evidence tending to prove such negligence on the part of the defendant, or his agents or servants, the plaintiff cannot recover.

APPEAL from Pennington county court.

J. W. Fowler, for appellant.

Wood & Buell, for respondent.

CORSON, P.J.—This was an action brought by the plaintiff to recover damages for hay and other property destroyed by fire alleged to have been caused by the negligence of defendant's servants, and for the value of certain live stock alleged to have been killed by the negligence of defendant's servants and employés. Case stated.

At the close of the evidence on the part of the plaintiff the defendant moved the court to direct the jury to return a verdict for plaintiff for the value of certain live stock only, amounting to \$65, being the damages claimed in the second, third, and fifth causes of action, as stated in the complaint, and for the defendant on all the other causes of action, on the ground that there was no proof that the fire mentioned in the first cause of action was occasioned by the employés or agents of the defendant; and, if occasioned by such employés, there was no evidence that such agents or employés were acting within the scope of their authority; and, further, that there was no evidence that defendant's agents and servants were guilty of negligence, or that the fire started on defendant's right of way was the proximate cause of the burning of the plaintiff's property; and, further, that there was no evidence that the cow, for the loss of which damages were claimed in the fourth cause of action, was ever killed or injured by defendant. The motion was denied.

On the submission of the case to the jury, the counsel for the defendant requested the court to give the jury the following instruction: "The court instructs the jury that before the declarations of these men who set the fire on August 31, 1889, can be admitted in evidence against the defendant, some evi-

dence that they were authorized to act for the company in relation to the setting out of fire and burning off the right of way must be introduced,"—which was refused, and exception duly taken.

The refusal to grant the defendant's motion and to give the instruction requested are assigned as error.

It is further assigned as error that the evidence is insufficient to sustain the verdict.

The learned counsel for the appellant contends that there was no proof that the persons who set the fire on the defendant's right of way were the servants of the defendant, or were acting within the scope of their authority, if in fact they were such servants of the defendant. Assuming that no such proof was before the court, was such proof necessary under the pleadings in the case? The first question presented, therefore, is as to the effect of the qualified denial and admission in the answer.

Admission of
acts of servants
by answer—
Necessity of
proof.

The complaint is in the usual form. In the first cause of action it is alleged "that the defendant, on said 31st day of August, A. D. 1889, by its servants and employés, intentionally kindled a fire on its said right of way, near to and adjoining the plaintiff's land above described, and so negligently watched and tended the said fire that it came to this plaintiff's said land, and burned over a large portion thereof, to wit, sixty acres of said land, and destroyed and consumed twenty tons of said hay in stack on said land, and of the value of one hundred and thirty dollars, and destroyed and consumed ten tons of said hay on cock on said land, and of the value of sixty dollars, and destroyed and consumed sixty tons of said grass standing uncut on said land, and of the value of three hundred and sixty dollars."

The answer, after admitting the corporate capacity of the defendant, and that it was engaged in operating a line of railroad in the county of Pennington, S. D., makes the following denial: "Second. The defendant denies each and every allegation and averment contained in plaintiff's complaint herein which is not hereinafter specifically admitted or qualified; and the defendant denies that the plaintiff was damaged by the defendant, or its agents, servants, or employés, in the sum of eight hundred and ninety dollars, or in any other sum whatever; and further denies that the property mentioned in the said plaintiff's complaint was of the value of nine hundred and twenty dollars, or that it was of any value whatever."

The third paragraph of the answer is as follows: "For further and affirmative answer in the first cause of action in plaintiff's complaint, the defendant says that it now is, and for

more than three years last past has been, the owner of a strip of land one hundred feet in width, to wit, fifty feet in width on each side of the centre line of the defendant's said railroad, where the same passes over and across the southwest quarter of section seventeen, in township one north, of range eight east, Black Hills meridian, in said Pennington county, state of South Dakota, and that this defendant became the owner thereof in the manner provided by law, to wit, by the condemnation of said strip of land to be used as a right of way for said railroad in the manner provided by law, and by the payment thereof, as is provided by law in such cases, and that such strip of land is used by the defendant as a road-bed and right of way through the said land described in the first cause of action in plaintiff's complaint; that on the 31st day of August, 1889, the defendant's servants were burning upon said strip of land, to wit, upon defendant's right of way, the prairie grass, rubbish, and combustible material thereon, for the express purpose of preventing the spread of prairie fires, and that such servants used due care and precaution to prevent the fire from spreading from defendant's right of way to the land belonging to the adjoining owners, and that they particularly used due care to prevent the spread of fire onto the said land claimed by plaintiff in his complaint. And the defendant denies that its said servants and employes so negligently watched and tended said fire upon said right of way that it came to the plaintiff's land, and burned any of his said property, but alleges the fact to be that it was using all means within its power to so keep its said right of way and road-bed that it would cause the least possible danger to the adjoining owners."

This court has held, in several cases, that an admission in one defense in an answer cannot be referred to as supplying proof of an allegation in the complaint, when there is a general or specific denial of the allegations of the complaint. But in the case before us there is no general or specific denial, except as hereinafter "specifically admitted or qualified." In the paragraph from the answer quoted, the defendant specifically admits that the persons engaged in setting the fire were its servants, lawfully engaged in burning off its right of way. The pleader substantially admits in the answer the allegations of the complaint which we have quoted.

We are of the opinion that under this qualified form of denial the admission was available to the plaintiff, and he was not required to give evidence that the persons setting fire on the defendant's right of way were the servants of the defendant, or were acting within the scope of their authority.

But, independently of the admissions in the pleadings, we are

of the opinion that the evidence fully warranted the jury in finding that the parties setting the fire were the servants of the defendant, and that they were acting within the scope of their authority. As the evidence upon this subject contained in the record is short, we reproduce it here: "Mr. Farrell, a witness sworn on behalf of plaintiff, testified: * * * On the day of the fire, August 31, 1889, witness was digging a well on his own premises. It was down to the depth of about 22 feet. He was up and down several times from the well, and saw, as he stated, section-men burning along the road on the east side. The wind was then blowing from the southeast. The witness testified that about one o'clock, in his judgment, the fire was getting away from the men, and he sent Mr. Schleuning's boy to so inform them. Witness then went to help beat out the fire, and what he calls 'section-boss' sent two men to help put the fire out. * * *

"Witness Johns, sworn on part of plaintiff, testified as follows: That he was returning home about eleven o'clock in the forenoon, and then saw fire along the railroad. He states it was section-men burning off the right of way. This witness assisted in preventing the spread of the fire, and thinks there were four section-men, and that they did all they could to prevent the spread of the fire, and kept right on working to that end. At the time this witness went out to assist, the fire had only a few minutes previously broken away. The wind had changed, so witness stated, so that the inclination was to blow from the track rather than towards it. Witness also testified that the section-hands told him that they were burning fire-guards along the track, and the fire got away from them.

"Ernest Schleuning, a young boy, sworn as a witness on the part of plaintiff, testified: That the fire started about forty rods from the southeast corner of John Farrell's place. He saw four or five men working setting fire. At the time the fire started near Farrell's place, the men were about eighty rods distant, down near plaintiff's fence. Witness was here asked if they left the fire burning, to which he answered, 'No; the section-boss sent a couple of men to put the fire out, and the men came up, and the wind was blowing a little, and it got away from them.' They had to come about eighty rods, and the witness says Mr. Farrell sent him down to tell them."

It will be observed that these witnesses described the men as "section-men," and the man in charge as "the section-boss." We may presume, in the absence of any cross-examination, that the witnesses were acquainted with these "section-men" and "section-boss" on this portion of the line of the road. The further fact appearing, that the men were engaged in the daytime in performing work usually done at

that season of the year by railroad companies, in the absence of any evidence upon the subject by the defendant, was, we think, sufficient to justify the jury in finding that they were servants of the company, and acting under its orders, without giving any effect to the declaration made by the section-men to the witness Johns. The evidence of all the witnesses on behalf of the plaintiff proved precisely what the section-men stated to Johns,—that the fire got away from their control.

Again, counsel for the appellant contend that there was no evidence of negligence in the management of the fire, and therefore the court should have granted the motion of defendant. We are of the opinion that, as to the first cause of action, the motion of the defendant should have been granted. It will be observed that there is no evidence on the part of the plaintiff—all of which contained in the abstract is given in the opinion, so far as the same relates to the fire—that the defendant's servants and employes were guilty of negligence, either in the setting or management of the fire. On the contrary, the evidence of plaintiff's witness Johns is "that they [the defendant's servants] did all they could to prevent the spread of the fire, and kept right on working to that end. At the time the witness went out to assist, the fire had only a few minutes previously broken away. The wind had changed, so witness stated, so that the inclination was to blow from the track rather than towards it." It further appears that the section-boss sent two men to assist the four section-men in their efforts to control and prevent the spread of the fire. It will thus be seen that the evidence, so far as the same appears in the record before this court, tends to negative any negligence on the part of the defendants' servants, rather than to prove any negligence on their part.

Necessity of
proof of negli-
gence.

The weight of authority in this country undoubtedly sustains the rule that in cases of this class the plaintiff must affirmatively prove negligence on the part of the defendant, to entitle him to recover for damages caused by a fire set by the defendant for a lawful purpose on his own premises. In *Shearman & Redfield on Negligence*, the authors, after discussing the rule in England, say: "But this rule is certainly not law in any part of the United States. In any case in which one makes a fire on his own land for a lawful purpose, and the fire spreads upon other land, the person complaining thereof must affirmatively prove negligence, of which the fire itself is no evidence." *Shear. & R. Neg. (4th Ed.)* § 668. Mr. Thompson, in his work on *Negligence*, thus states the law: "Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been

held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage, with proof of negligence." 1 *Thomp.* pp. 55, 56.

In *Tourtellot v. Rosebrook*, 11 *Metc. (Mass.)* 430, the court says, on pages 462 and 463: "The only material question raised by these exceptions is whether the jury were rightly instructed as to the burden of proof. The action was trespass upon the case, charging the defendant with carelessly setting fire to a coalpit on his own land, and not watching the same with proper care and diligence, in consequence of which neglect the fire escaped from the said coalpit, and was conveyed, by the wind or otherwise, to the plaintiff's land, there doing the damage complained of. The court ruled, and so instructed the jury, that the burden of proof was on the plaintiff to prove that the defendant, in the burning of his coalpit, did not use due care and diligence to control the fire and prevent its escape to the surrounding lands. This ruling, we think, was very clearly correct. The action is founded on a charge of negligence, and this is the gist of the action: for the defendant had a right to kindle a fire on his own land, using reasonable care and diligence to prevent its spreading and doing injury to the land of others. If, then, the jury doubted as to the charge of negligence, they could not find for the plaintiff, and consequently the burden of proof was on him. * * * For the same reason, the plaintiff in this case had the burden of proof of the defendant's negligence, because, unless that fact was proved, it is very clear that the action cannot be maintained."

This is referred to by most of the text-writers and courts, and may be regarded, as a leading case upon the question as to the party upon whom rests the burden of proof in actions of this class.

In *Lossee v. Buchanan*, 51 *N. Y.* 476, the court, on page 487, says: "In conflict with the rule as laid down in the English cases is a class of cases in reference to damage from fire communicated from the adjoining premises. Fire, like water or steam, is likely to produce mischief if it escapes and goes beyond control; and yet it has never been held in this country that one building a fire upon his own premises can be made liable if it escapes upon his neighbor's premises and does him damage, without proof of negligence."

In *Clark v. Foot*, 8 *Johns.* 421, the court says: "It is a lawful act for a person to burn his fallow; and, if his neighbor is injured thereby, he will have a remedy by action on the case, if there be sufficient ground to impute the act of negligence or misconduct of the defendant or his servants. Should a man's

house get on fire without his neglect or default, and burn his neighbor's, no action would lie against him, notwithstanding the fire originated in his house, because it was lawful for him to keep fire there. 3 Bl. Comm. 43; Noy's Max. c. 44. The same rule would apply to this case." *Stuart v. Hawley*, 22 Barb. 619; *Calkins v. Barger*, 44 Barb. 424; *Lansing v. Stone*, 37 Barb. 15; *Barnard v. Poor*, 21 Pick. 378; *Tourtellot v. Rosebrook*, 11 Metc. (Mass.) 460; *Bachelor v. Heagan*, 18 Me. 32; *Catron v. Nichols*, 81 Mo. 80; *Higgins v. Dewey*, 107 Mass. 494; *Sturgis v. Robbins*, 62 Me. 289; *Sweeney v. Merrill*, 38 Kan. 216.

For a very instructive case upon the question of the general liability for damages by a party in the use of his own premises, see opinion of Bronson in *Radcliff v. Mayor, etc.*, 4 N. Y. 195. As bearing upon this question, see, also, *Moe v. Job*, 1 N. D. 140; *Thoburn v. Campbell*, 80 Iowa, 338; *Russell v. Reagan*, 34 Mo. App. 242; *Garnier v. Porter*, 90 Cal. 105; *Whart. Neg.* § 867; *Fahn v. Reichart*, 8 Wis. 255; *Railroad Co. v. Butts*, 7 Kan. 308.

It will be observed, from the allegation of the complaint quoted above, that there is no allegation that there was any negligence on the part of the defendant in setting the fire, or that it was set at an improper time or place, or in an improper manner, and that the only negligence complained of is "that it was so negligently watched and tended that it came to plaintiff's land." It is clear, therefore, that, in the absence of evidence tending to prove negligence on the part of defendant's servants in so allowing the fire to escape from its right of way, the plaintiff could not recover. That there is a total want of such evidence, as we have seen, clearly appears from the evidence in the record. As the court, therefore, should have granted the plaintiff's motion as to the fourth cause of action, for its refusal to do so the case must be reversed.

Again, in his motion to direct a verdict, the counsel for appellant insisted that a verdict should be directed for the defendant upon the fourth cause of action, upon the ground that there was no evidence that the cow, for the killing of which damage was claimed, was ever struck or killed by the defendant's locomotive or cars. The only evidence in the abstract upon that question is stated as follows: "Regarding the cow mentioned in the fourth action in the complaint, the plaintiff testified that she drifted away in a severe storm, and was not found until three days afterward, and when found she was in a standing position in a mud-hole near the defendant's track, with only her head and back above the surface. She was not seen on the defendant's track, and there was no evidence along the track that

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Burden of
proof.

she had been there. Witness testified that the hair was off the top of her back, and the top of her head had the appearance of being bruised.

We are of the opinion that the court should have directed a verdict for the defendant on this cause of action, under this evidence. It will be observed that there is no evidence that the cow was killed, or her death in any way caused, by the defendant, its agents, or servants. Under our statute section 5501, Comp. Laws), upon proof that the death was caused by the defendant, its agents, or servants, the plaintiff would be entitled to recover without any proof of negligence on the part of the defendant, negligence being presumed. But evidence sufficient to warrant a jury in finding that the killing was caused by the defendant must be given on the part of the plaintiff. This the plaintiff failed in this case to give.

Our conclusion is that the judgment of the circuit court, so far as it is based upon the first and fourth causes of action, should be reversed, and a new trial granted. We do not deem it necessary to discuss the instruction refused, or error alleged as to the admission of evidence, as no such question may arise in a future trial.

The judgment of the court below, so far as it is based upon the first and fourth causes of action set out in the complaint, is reversed, and a new trial ordered; all the judges concurring.

Negligence of Railroad Company in Leaving Combustible Material on Right of Way.—See *Kurz & Huttenlocher Ice Co. v. Milwaukee & Northern R. Co.* (Wis.), 56 Am. & Eng. R. Cas. 94, and note, 100.

Presumption of Negligence by Fact of Fire.—See *Jacksonville, Tampa & Key West R. Co. v. Peninsular Land, Transportation & Manufacturing Co.* (Fla.), 49 Am. & Eng. R. Cas. 603, and note, 668.

Sufficiency of Fact of Fire to Charge Company with Negligence.—*Missouri Statute.*—In *Adams v. St. Louis & S. F. R. Co.* (Mo., Dec. 4, 1894), 28 S. W. Rep. 496, it was held that the act approved March 31, 1887 (Rev. Stat. 1889, § 2615), establishing the responsibility of railroad corporations, companies, and persons owning or operating railroads, for damages by fires communicated by locomotive engines, charges a company with negligence by the mere fact of injury by fire so communicated. *Following Mathews v. St. Louis & S. F. R. Co.*, ante, p. 432.

Necessity of Proof of Improper Condition or Negligent Management of Engine.—In *Flinn v. New York C. & H. R. R. Co.* 142 N. Y. 11, it was held that in order to render a company liable for the burning of a building upon property adjacent to its tracks, caused by the escaping of sparks from passing engines, the improper condition, or negligent management of its engines must be proved.

Presumption of Negligence from Fact of Fire.—In *Texas & P. R. Co. v. Levine* (Texas, Jan. 21, 1895), 29 S. W. Rep. 466, it was held that proof that a fire which destroyed plaintiff's property was set from an engine on defendant's railroad makes a *prima-facie* case, upon which the plaintiff is entitled to recover, in the absence of proof by the railroad company required to rebut the presumption, and therefore the question as to negligence or not becomes a question of fact to be determined upon the evidence.

In *International & G. N. R. Co. v. Searight* (Tex., Nov. 7, 1894), 28 S. W. Rep. 39, it was held that in actions for damages sustained from fires communicated by railway engines, *prima facie* a case is made and negligence shown on the part of the railroad company by proof that the fire was communicated to plaintiff's property by escape of fire from one of defendant's engines. Citing *Railway Co. v. Benson*, 69 Tex. 407, 32 Am. & Eng. R. Cas. 330; *Railway Co. v. Horne*, 69 Tex. 643, 35 Am. & Eng. R. Cas. 238; *Railway Co. v. Wallace*, 74 Tex. 581, 40 Am. & Eng. R. Cas. 248.

Illinois Statute.—*Louisville, E. & St. L. C. R. Co. v. Spencer*, 149 Ill. 97, it was held that the act of March 29, 1869, respecting fires caused by locomotives, makes the fact of the communication of the fire by a locomotive "full *prima-facie* evidence" to charge the company with negligence.

It was further held that under the act a company is liable, if a fire is communicated by one of its locomotives, since the fact that the fire was so communicated is *prima-facie* evidence to charge the company with negligence, either on account of the condition of its engine, or the manner in which the engine was operated at the time of the communication of the fire.

Arkansas Statute.—In *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, it was held that proof that a fire which was communicated from a railroad right of way to adjoining lands, escaped from a locomotive using the right of way, raised a presumption of negligence on the part of the railroad company under Mansf. Dig., § 5537, which must be overcome on the part of the company by proof that the engines in use by it were proper and safe, and that its employes were operating them with due care.

Liability of Company in Absence of Proof to Rebut Presumption.—In *Texas & P. R. Co. v. Levine* (Texas, Jan. 21, 1895), 29 S. W. Rep. 466, it was held that when fire is set out by sparks from an engine on a railroad, the law presumes negligence, and the plaintiff is entitled to recover for damages done by the fire so set out, unless the railroad company shall prove that its engine was provided with the best approved apparatus for arresting sparks and preventing their escape, and was properly operated.

Province of Jury as to Sufficiency of Rebuttal of Presumption of Negligence.—In *Louisville, E. & St. L. C. R. Co. v. Spencer*, 149 Ill. 97, it was held that whether evidence adduced by a railroad company is sufficient to rebut the *prima-facie* evidence of negligence arising from the fact of the communication of fire from one of its engines, is a question of fact as to which the determination of the appellate court (Illinois) is conclusive.

Overcoming Rebuttal of Prima-facie Proof of Negligence—Province of Jury.—In *International & G. N. R. Co. v. Searight* (Tex., Nov. 7, 1894), 28 S. W. Rep. 39, it was held that where plaintiff has made a *prima-facie* case by showing the communication of fire by one of defendant's locomotives, and the defendant rebuts it by showing that its engines were the most approved in use, properly equipped with fire arresters and skilfully operated, and then plaintiff undertakes to show that it is still liable from additional cause, or negligence, such negligence must be shown and the question of negligence or not must be submitted to the jury.

HOSKINSON

v

CENTRAL VERMONT R. CO.

(66 Vermont, 618.)

Action for Damages by Fire Communicated by Locomotive—Sufficiency of Description of Property Destroyed.—In an action for damages sustained by the burning of property by fire communicated from engines of a railroad company, a description of the property destroyed as “a certain dwelling-house, sheds, and barn, together with the contents thereof, consisting of household furniture, family wearing apparel, provisions, fuel, farming utensils, hay, grain and fodder,—all of the value of \$5000, is sufficient to authorize a recovery for anything clearly within the class of property enumerated.

Same—Sufficiency of Proof as to Cause of Fire—Evidence of General Behavior of Defendant's Engines as to Throwing Fire.—In such an action where the identity of the particular engine setting the fire cannot be established, evidence as to the general behavior of defendant's engines in respect to throwing fire at the locality where the injury occurred and within a reasonable time before its occurrence, is admissible.

Same—Proof of Former Throwing of Fire at Place of Injury.—In the absence of direct testimony that the fire was set by sparks from an engine, proof may be given that upon a previous occasion, live cinders had been thrown over the buildings and had set fires upon the further side thereof, since the tendency of such evidence would be to show that fires might be communicated at that distance from the track.

Same—Sufficiency of Proof of Articles Lost—Schedule made by Witness with Assistance of Another Person.—On the trial of the action, the plaintiff produced a schedule, and testified that he had lost the articles enumerated therein, and the schedule was then admitted as a part of his testimony. Upon cross-examination plaintiff testified that he had no knowledge as to many of the articles, but had made the list with the assistance of his wife, who was not a witness. *Held*, that the paper was properly submitted to the jury against the objection of defendant, and that if they desired any further instructions in regard to it the attention of the court should have been directed thereto.

EXCEPTIONS from Rutland county court.

The plaintiff claimed to recover for the destruction of his house, barns, and their contents. There was no direct evidence as to how the fire originated, but the testimony of the plaintiff tended to show that, soon after the passage of one of the defendant's freight trains, fire was discovered in the gable end of the barn nearest the tracks, from which it spread, and consumed the other buildings. The

Case stated.

barn in question was 125 feet distant from the tracks, and its foundations were 25 feet above the level of the track.

The description of the property in the declaration was as follows :

“ A certain dwelling-house, sheds, and barns, together with the contents thereof, consisting of household furniture, family wearing apparel, provisions, fuel, farming utensils, hay, grain, and fodder,—all of the value of five thousand dollars.”

Upon the trial the plaintiff produced a schedule containing an itemized list of the various articles of property alleged to have been destroyed, with the value of each. The defendant insisted that under the general description in the declaration the plaintiff was not entitled to recover for any of the personal property, and objected to the admission of any and all evidence relating to the loss or value of the articles of personal property mentioned in the schedule, or of any personal property alleged to have been destroyed. The court overruled the objection, and admitted evidence of the loss of the various articles of personal property mentioned in the schedule, with their respective values, to which the defendant excepted.

The plaintiff testified in chief that he had lost, by the fire in question, the articles of property mentioned in said schedule, and that the values carried out in said schedule were the correct values. There was no other testimony as to the loss or value of the personal property, except that of the plaintiff. The schedule was admitted, not as independent evidence, but in connection with the testimony of the plaintiff. Upon cross-examination the plaintiff testified that said schedule was made soon after the fire, by himself and his wife; that he himself had no personal knowledge in respect of many items therein contained, such as family wearing apparel, household supplies, and minor articles of household furnishings, but that he and his wife had intended to set down correctly the articles lost, and the values of such articles. Upon re-examination he testified that he had a general knowledge of the articles of personal property so destroyed, and the value of the same.

The defendant objected that this schedule ought not to go to the jury. This objection the court overruled, and permitted the schedule to go to the jury, to which the defendant excepted. At the time of admitting it the court said that it might be admitted as a bill of particulars, but made no further reference to it during the trial, except in the following extracts from the charge :

“ You will determine what the fair cash value of the buildings was, and the testimony, then, is that there was the household furniture and the clothing of the family and the family

supplies. I think all the items that are included in the specification came fairly within the description, and it is for you to say whether the plaintiff has established that he lost all this property, and what its fair value is."

"It is for the jury to say, when they weigh all the evidence, whether the opinion of this plaintiff is fair as any as to the value of this property. He says some of it was made up with the assistance of his wife; that he did not have much knowledge of it himself; and he has testified to you how he got at the articles destroyed and the value of them, and you have heard his testimony. You will take that, and you will look over the list of the property itself. And it was property mostly that had been used, as I understood, in the family,—what we should call second-hand property; and you will see what he has established, by a fair balance of testimony, was the value of his property, and for such sum as will cover the fair value of the property described and the buildings burned; and this property that is described and specified, so far as he has shown you and satisfied you it was consumed by this fire, he is entitled to recover what will fairly compensate him; what it is fairly worth; its fair cash value."

As tending to show that cinders might be carried this distance, the plaintiff, in opening his case, introduced evidence that beyond the barn, and some distance from it, was an awning, and that previous to the time of the fire in question cinders had fallen upon and burnt this awning, which must have come from the locomotives of the defendant, over the barn and house. There was no evidence tending to show that the cinders which burnt the awning were thrown by the same engines which were claimed to have set the fire in question, nor as to the conditions under which they were thrown to that distance, except it appeared that these same engines which were running over the road at the time of the fire were being used when the fires were set to the awning. To the admission of this testimony the defendant objected and excepted.

L. M. Read and Geo. E. Lawrence, for plaintiff.

C. A. Prouty and C. W. Witters, for defendant.

MUNSON, J.—In actions to recover damages for the injury or destruction of personal property, no greater certainty in description is required than the nature of the articles will conveniently admit of. Gould, Pl. c. 4, § 33. But it is generally necessary to state the quantity or number of the goods in respect of which the loss is alleged to have been sustained. *Id.* § 35; 1 Chit. Pl. 377. It is said, however, that even this may be dispensed

Sufficiency of
description of
property
destroyed.

with when the subject-matter of the suit embraces a multiplicity of particulars. Gould, Pl. c. 4, § 36. In the section last cited there is the following special application of this rule:

"In an action for the loss of goods by the burning of the plaintiff's house, the goods may be described by the simple denomination of 'goods,' without any designation of their quantity or kind; and it seems that in such a case the words 'divers goods' would be sufficient."

A reference to some of the cases from which these rules have been deduced will aid us in determining the sufficiency of the description now in question. It was held in *Emery's Case*, cited in 1 Vent. 114, that in declaring for the conversion of books it was sufficient to describe the property as "a library of books;" and the adequacy of a description of this character in the case of such property has since been uniformly recognized. Gould, Pl. c. 4, § 36; 1 Chit. Pl. 378; Steph. Pl. 349. Similar descriptions of other personal chattels have been held sufficient in actions of tort for the recovery of damages, both before and after verdict. In trover for a parcel of diamonds, there having been judgment for the plaintiff, it was insisted in error that the case should be distinguished from one where the allegation covered the wrappings and cords of the parcel, and that, inasmuch as each diamond was distinct, the suit should have been for so many diamonds; but the court thought otherwise, and affirmed the judgment. *White v. Graham*, 2 Strange, 827. In trover for "old iron," after verdict for the plaintiff, it was urged in arrest of judgment that the description was too uncertain; but the court could think of no way in which it could be made more certain, unless it were by stating some number of pounds, and held this unnecessary, and so discharged the rule. *Talbott v. Spear*, Willes, 70. In trespass for breaking and entering the plaintiff's house, and taking and carrying away "divers quantities of chinaware, earthenware, and linen," without setting forth the particulars, the declaration was held sufficient on motion in arrest after default suffered. *Hobb v. Greene*, Barnes, Notes Cas. 276. In a case for the negligent management of fire, by means of which the plaintiff's barn was burnt, and "divers goods" lost, it was held, on motion in arrest, that "divers goods" was sufficient. *Prior v. Tufts*, 1 Neb. 825.

The declaration in this case alleges the destruction by fire of the plaintiff's "dwelling-house, sheds, and barns, together with the contents thereof, consisting of household furniture, family wearing apparel, provisions, fuel, farming utensils, hay, grain, and fodder,—all of the value of five thousand dollars." The defendant claimed on trial that under this general description the plaintiff was not entitled to recover for any

personal property, and objected to the evidence offered to establish the loss and value of the articles claimed to have been destroyed, and insisted that the plaintiff's right to recover therefor should not be submitted to the jury. It is now urged that, while the plaintiff might be excused from setting forth every article of household furniture or wearing apparel, he could easily have stated the quantity of the hay, grain, and fodder alleged to have been destroyed, and therefore was required to do so. We shall dispose of the question thus presented without considering whether the defect claimed is one that can be taken advantage of by an objection to the evidence. It is certain that an objection to the evidence cannot entitle the defendant to have the declaration tested by a more stringent rule than would be applied upon a motion in arrest of judgment. The defendant cannot be permitted to go to trial without having demurred to the declaration, and defeat the result of the trial for any defect of the declaration not sufficient to sustain a motion in arrest. So the question for decision is whether the description of any class of property is so defective that no proof of the destruction of any property of that class should have been received or submitted to the jury; and the matter is to be determined by the same rules that would have governed if the defect had been called in question by a motion in arrest. This being so, all the cases above cited are of authority upon the matter in issue; and the extract from Gould, even if questioned in its application to demurrers, must be accepted as applicable here.

The allegations of this declaration show a cause of action without the aid of any inference or intendment. They charge a wrongful destruction by the defendant of the plaintiff's personal property of the different kinds stated. The destruction of a single article, or of the least appreciable amount, of any of the kinds stated, gives a right of action. The only defects that can be claimed are the failure to give a more minute classification, and to state the number or amount of each class. The property alleged to have been destroyed is specified, but not with particularity or limitation. So the defect is at most but an uncertainty of description; and any mere uncertainty in the declaration, if not otherwise cured, is made good by the verdict. An application of this rule to defects like the one now insisted upon is not without precedent in our own state. In actions to enforce statutory penalties and official liabilities, this court has held that the failure to enumerate the personal property on account of which the defendant is claimed to be liable is a defect that is cured by verdict. *Fuller v. Fuller*, 4 Vt. 123; *Wetherby v. Foster* 5,

Vt. 136. We see no reason for holding otherwise in cases like the present.

It has often been remarked that the rule requiring an allegation of number or quantity in actions of tort is of little practical utility. The plaintiff is not obliged to prove the number or quantity alleged, and so alleges some number or quantity as a compliance with the rule, without any attempt to qualify himself to make an allegation of substantial accuracy. As the only effect of the allegation is to prevent his recovering more than is alleged, his purpose is ordinarily to allege something altogether beyond reach of his proof; and the result is an allegation which is of no benefit to the defendant. Whatever effect might be given to these considerations in determining a question of sufficiency on demurrer, they certainly justify an adherence to the authorities which hold that omissions of this character are cured by verdict. We are not disposed to hold defective, under the rules applicable to motions in arrest, a declaration which, considered with reference to its sufficiency to support a judgment, is clearly within the requirements of a text-writer of the highest credit, and fairly sustained by ancient precedents. There is certainly as little necessity for unusual strictness in this particular in cases like the present as in any actions of tort. It is evident that when a house or barn is destroyed with its contents, and recovery is sought for both buildings and contents, a designation of the personal property as "the contents of the building" carries an element of description which to some extent supplies the want of those statements of number or quantity which are ordinarily given. We hold the allegations of this declaration sufficient to sustain a recovery for whatever is clearly within any class of property therein named.

The plaintiff did not know, and was not permitted to ascertain from the records of the station-agent, which of the defendant's engines passed his house shortly before the fire was discovered. It was therefore impos- Sufficiency of
proof as to
cause of fire.
sible for the plaintiff to furnish any proof as to the particular engine which he claimed had caused the loss. Under these circumstances it was proper to permit the plaintiff to introduce evidence, legitimate in its character, as to any of the defendant's engines which had been in use upon the line within a reasonable time before this occurrence. It has frequently been held in cases of this kind, in view of the plaintiff's difficulty in identifying any particular engine, and of the probability of a similarity in the defendant's equipment, that the plaintiff may put in his evidence upon the theory that all the engines of the defendant in use upon the

same line are substantially alike. *Sheldon v. Railroad Co.*, 14 N. Y. 218.

The plaintiff's buildings were 125 feet from the track, and there was no direct evidence of the communication of sparks. It was necessary for the plaintiff to overcome any presumption which might arise from the fact of distance against the probability of his claim. As tending to show that cinders from a passing engine might have been carried that distance on the occasion in question, the plaintiff was permitted to prove that, previous to this, cinders which must have come from a locomotive had fallen upon and burned through an awning in line with the plaintiff's buildings, and still further from the track. The evidence was admissible for this purpose. It was like evidence of an experiment made use of to show that something which could not be established by direct evidence might have occurred. See *Kent v. Lincoln*, 32 Vt. 591; *Walker v. Westfield*, 39 Vt. 246; *State v. Flint*, 60 Vt. 304. It is said in the case last cited that the fact that the conditions are not entirely similar does not make the evidence inadmissible, but merely bears upon its weight. The fact that this test was available without having been made for the purpose of furnishing evidence certainly cannot affect its admissibility. As the exceptions do not show how long this was before the occurrence complained of, it must be presumed to have been within such recent period as would have made the evidence admissible in point of time. Whether evidence of a single instance of this character would have been admissible for the purpose of showing habitual negligence on the part of the defendant it is not necessary to consider.

The schedule of goods destroyed was not admitted as evidence, but as a bill of particulars. In the charge it was referred to as a "specification" and as a "list of the property" for which the plaintiff claimed to recover. The defendant excepted to the action of the court in permitting this paper to go to the jury. The paper came into the case without objection, in connection with the plaintiff's direct examination as to the loss and value of the property. It appeared on his cross-examination that the list was prepared with the assistance of his wife, and from further examination that his knowledge of some of the property specified was only general. The defendant insisted that, in view of the information obtained after the paper was received, it ought not to go to the jury, but did not ask any instructions limiting their consideration of the plaintiff's testimony concerning the property, nor except to any failure of the court in that respect. We think that, so long as it was

not questioned but that there was evidence to go to the jury as to all the property embraced in the list, it was not error to permit the paper to go into their hands in furtherance of the purpose for which it was received. The jury could not safely pass upon the evidence submitted to them without the aid of such a paper. The nature of the paper and the purpose for which it was received having been clearly indicated at the time of its admission, it was not error to place it before the jury with such limited references to its character as the charge contained. If the defendant desired that the jury be more particularly cautioned as to the use which they were entitled to make of it, the attention of the court should have been called to the matter. The exceptions present no question as to whether the knowledge of the plaintiff was such that his testimony was proper to be submitted to the jury as evidence tending to establish the amount and value of the property lost. Judgment affirmed.

TAFT, J., concurs in the result.

Damages for Destruction of Property by Fire.—See *Jacksonville, Tampa & Key West R. Co. v. Peninsular Land Transportation and Manufacturing Co.* (Fla.), 49 Am. & Eng. R. Cas. 603, and note, 668; *Ft. Worth & New Orleans R. Co. v. Wallace* (Tex.), 40 Am. & Eng. R. Cas. 248, and note, 252.

Actions Against Railroad Companies for Damages Caused by the Communication of Fires—*Nature of Action*—*Charging Negligence at Common Law or Liability under Statute*—*Breach of Agreement by Company to Move Structure Back from Track*.—In *Hunter v. Columbia, N. & L. R. Co.* (S. Car., March 14, 1894), 19 S. E. Rep. 197, the complaint set out in effect that plaintiff in consideration that a railroad company would move back a structure belonging to him and which stood close to the track, granted a right of way to the company, which although requested, never performed the obligation on its part to move the structure, and that by reason of the negligence of the company in that respect, and in setting fire to the structure, it was destroyed, and it was held that the complaint stated a cause of action against the company for negligence, and did not state a cause of action under a statute (Gen. Stats., § 1511), which imposed absolute liability on a railroad company for injury to property by fire set by its locomotives.

Pleading.—*Sufficiency of Complaint*—*Allegation of Negligence*.—In *Black v. Aberdeen & W. E. R. Co.* (N. Car., Dec. 4, 1894), 20 S. E. Rep. 713, an allegation in the complaint that the defendant "negligently permitted fire to be communicated from their engines or property to the lands adjoining their railroad and right of way, by which said fire, the spread and extension thereof, plaintiff's said turpentine was burned and destroyed," was held to be a sufficient allegation of negligence on the part of defendant, resulting in damage to the plaintiff.

Charging Negligence of "Authorized Agent" of Company—*South Carolina Statute*.—In *Mayo v. Spartanburg U. & C. R. Co.*, 40 S. Car. 317, it was held that under section 1511 of the General Statutes, which renders railroad companies liable for fires resulting from the act of their "authorized agents," a complaint which alleges that a fire resulted from the

act of an "agent" of the company is not defective because failing to allege that the agent was an authorized agent.

Averment of Injury to Growing Trees as Allegation of Injury to Freehold.—In Louisville, E. & St. L. R. Co. v. Spencer, 149 Ill. 97, it was held that trees and bushes bearing fruit and berries are, as between the landowner and the railroad company which injures them by fire, real property and a part of the freehold, and that an averment of wrongful injury or destruction of such trees or shrubs is *ex vi termini* an averment of injury to the freehold.

Amendment of Complaint by Setting up Action Barred by Limitation.—In Mayo v. Spartanburg U. & C. R. Co. (S. Car., Feb. 23, 1895), 21 S. E. Rep. 10, it was held that in an existing action brought against a railroad company to enforce a statutory liability for damage by fire, the plaintiff will not be allowed to amend his complaint by changing the cause of action to one for negligence at common law after the right to institute such an action has been barred by the statute of limitations.

Failure of Pleadings to aver Contributory Negligence—Availability of Defense.—In Union Pac. R. Co., v. Tracy, 19 Colo. 331, it was held that in actions under Gen. Stat. § 2798, imposing upon railroad companies liability for loss by fires occasioned by the operation of their roads, the defense of contributory negligence is not available to a company, where there is no averment in the pleadings upon which the defense could be based. *Citing* Railway Co. v. Ryan, 17 Colo. 98.

Variance.—Pleading and Proof—Location of Buildings Injured.—In Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, which was an action against a railroad company to recover for loss by a fire alleged to have been communicated by one of defendant's engines, it appeared that one count of the declaration described the buildings injured as situated on a certain block, but the proof showed that they extended over into the street, and it was held that this variance would not affect a recovery under other counts in the declaration.

Evidence—Admissibility.—Proof of Title by Limitation, in Absence of Averment Respecting Same.—In Gulf, C. & S. F. R. Co. v. Cusenberry, 86 Tex. 525, it was held that in an action against a railroad company to recover for loss by a fire alleged to have been caused by the negligence of the company in allowing fire to escape from its right of way, it was considered doubtful as to whether the plaintiff should be permitted to prove title by limitation without having pleaded it, provided that objection was made to the introduction of the testimony. *Citing* Mayers v. Paxton, 78 Tex. 196.

Oral Proof of Disputed Title to Land on which Loss Occurred.—In Mayo v. Spartanburg U. & C. R. Co., 40 S. Car. 317, it was held that in an action against a railroad company to recover damages sustained by fire alleged to have been set by the defendant company where the plaintiff alleges in the complaint his title to the land upon which the injury took place, and his title is denied by the answer of the defendant company, he cannot establish his right to recovery by a mere oral statement that he owns the land.

Proof of Warnings to Station-agent of Danger of Fire.—In Tribette v. Illinois Cent. R. Co., 71 Miss. 212, which was an action to recover for the loss of cotton at a station platform, caused, as alleged, by the negligence of a railroad company, in allowing sparks to escape from its locomotives, it was held that testimony as to warnings given by a witness to the station-agent of the danger of fire to adjacent buildings from the accumulation of cotton, was incompetent, since it merely involved the opinion of the witness, and did not relate to the condition which existed at the time of the fire, and furthermore, that the question as to whether the accumulation and disposition of the cotton was dangerous was a question of fact which was required to be proved in like manner as any other fact.

Proof of Rights of Company in Public Street.—In Lake Erie & W. R. Co.

v. Middlecoff, 150 Ill. 27, it was held that if a railroad company procure a right to lay a track in a street by condemnation or by grant, one suffering a loss by the escape of fire from an engine of the company may prove the nature and extent of the company's rights or the burdens imposed upon it by the exercise thereof, without pleading that it obtains its right by condemnation or by grant, and may also introduce a municipal ordinance for the like purpose.

Ordinance Requiring Maintenance of Wagon-road on Side of Track—Harmless Error.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, which was an action against a railway company for loss alleged to have been caused by the escape of fire from an engine passing through one of the streets of a city, it was held that the admission in evidence of an ordinance requiring the railroad company to maintain a good and sufficient wagon-road on each side of its track was harmless error, where no claim was made that the injury resulted from the violation of such ordinance.

Ordinance Limiting Rate of Speed.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, which was an action against a railway company for a loss caused by the escape of fire from a locomotive, it was held that plaintiff properly introduced in evidence an ordinance limiting the rate of speed of locomotives at the place of the fire, where, by the declaration he set out the ordinance, and averred that by reason of such excessive rate of speed sparks were thrown from the engine which set fire to his property, and the evidence was to the effect that a high rate of speed will cause the emission of sparks or coals from an engine.

Proof of Contemporaneous Fires on Line of Road.—In *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, it was held that where it is a question whether a fire which caused the damage for which an action was brought was communicated by a locomotive, evidence of other fires on the line of the road in the immediate vicinity about the same time, is inadmissible, in the absence of proof that such fires were caused by the locomotives of the defendant company.

Proof of Other Fires Set by Same Engine to Rebut Evidence of Proper Equipment and Careful Operation.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, which was an action against a railway company to recover for loss by fire alleged to have been set by one of its engines passing through one of the streets of a city, the proof offered by the company tended to show that the engine in question was in good repair, furnished with a suitable spark-arrester, had been recently inspected and found in good order, was under the control of a competent engineer, and was carefully operated, and it was held that to rebut this evidence the plaintiff could show that on the day his property was burned other fires were set by the same engine within a short distance from where the fire in question took place.

In *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, which was an action against a railroad company for the loss of cotton alleged to have been set on fire by sparks escaping from either one of two of its locomotives, it was held that the testimony of a witness that just prior to the fire, in open daylight, at a distance of about 100 yards, he had seen one of the engines, before reaching the station where the fire was alleged to have been set, sending out sparks which set fire to grass 50 feet from the track, was competent, as tending to contradict a contention by the company that its locomotives were in good condition, well equipped and carefully handled.

Statement by Employé of Company Subsequent to Fire.—In *Wendt v. Chicago, St. P., M. & O. R. Co.* (S. Dak., Dec. 20, 1893), 57 N. W. Rep. 226, it was held that a statement made by a section foreman of the defendant the day after a fire which it was claimed destroyed plaintiff's property, and while such section foreman was on or at the railroad track, at or near which it was claimed the fire started, that: "Certain it was started right

here. Now I shall catch hell, because of the fire getting away,"—was incompetent evidence, and should have been stricken out on motion made by defendant's counsel, since it appeared that the statement was made after the fire complained of, was not made by the foreman while in the performance of any duty imposed upon him by the company, or which he was authorized to perform by the company, and therefore was purely hearsay, and clearly incompetent.

In *Gordon v. Grand Rapids & I. R. Co.* (Mich., Dec. 28, 1894), 61 N. W. Rep. 549, it was held that it was error to admit evidence on the part of plaintiff that after the fire had been started by defendant's section foreman at a place remote from the scene of the fire, the witness asked the foreman if there was not danger in setting fires, and that the latter said he "didn't care a damn."

Conversation with Section Foreman.—In *Gordon v. Grand Rapids & I. R. Co.* (Mich., Dec. 28, 1894), 61 N. W. Rep. 549, it was held that there was no error in admitting testimony by the plaintiff as to a conversation had by him with the defendant's section foreman at the time the latter was setting fires, in which plaintiff stated to the foreman that he did not want him to set fires, that it was dry and that he (plaintiff) had wood and logs there.

Proof of Condition and Operation of two Engines one of which set the fire—Other Engines Throwing Sparks.—In *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, it was held that where plaintiff has shown that a fire was clearly caused by one of two locomotives, his recovery will not be defeated because of inability to prove which of them set the fire, but inquiries in that connection should be confined to the condition and operation of the two locomotives, and evidence that at other times other engines of the same company had thrown sparks, is incompetent. *Citing Railroad Co. v. Miller*, 40 Miss. 45.

Opinion Evidence—Location of Commencement of Fire.—In *Union Pac. R. Co. v. Gilland* (Wyo., Dec. 1, 1893), 34 Pac. Rep. 953, which was an action against a railroad company for a loss sustained as alleged because of the failure of a railroad company to properly guard against an extension of fire from its right of way, it was held that a witness who saw the fire soon after it commenced, noticed the direction of the wind, observed the course of the fire, and thereafter went over the ground and followed the track of the fire up to what impressed him as being its place of commencement, might properly state his belief as to the place of the commencement of the fire. *Citing Cavendish v. Troy*, 41 Vt. 99; *Yahn v. City of Ottumwa*, 60 Iowa 429; *Whittier v. Town of Franklin*, 46 N. H. 23.

Result of Observation as to Place Where Fire Started.—In *Union Pac. R. Co. v. Gilland* (Wyo., Dec. 1, 1893), 34 Pac. R. Co. 953, it was held that in an action against a railroad company because of loss sustained by alleged negligence on the part of the company in failing to take precautions to prevent the spread of fires from its right of way by burning off or making fire-guards, a witness who has stated what observation he made the day of the fire and the day after, may testify as the result of his observations his conclusion as to where the fire started.

Identity of Engine Causing Fire.—In *Smith v. Northern Pac. R. Co.*, 3 N. Dak. 555, which was an action to recover damages for a fire set by an engine of the defendant, in which the identity of an engine drawing a certain train of cars was a material question for the jury, a witness (who was about a half mile distant from the train when it passed) was asked, "State, if you know, the number of the engine drawing the train," and answered, "I believe it was number 44." On cross-examination he was asked, "What was the number of the engine?" and answered, "I believe it was number 44." He was then asked, "Do you know that this was engine number 44?" and answered, "It is my honest belief that it was engine 44."

It was her day to run. Her engineer was on it, and the railroad dispatcher would not deny it." *Held*, that the answers were not responsive, as they gave only the belief of the witness resulting from a course of reasoning deduced from facts and circumstances as to which the jury was as well qualified to judge as the witness.

Instructions—Necessity that Plaintiff's Instructions should Embody Facts Rebutting Negligence, and Inform Jury that prima-facie Case might be Overcome.—In *Louisville, E. & St. L. C. R. Co. v. Spencer*, 149 Ill. 97, it was held that the plaintiff need not embody in an instruction a statement of the facts brought out by the defendant company which would tend to rebut the *prima-facie* case of negligence against it, and have the jury informed that the *prima-facie* case made might be thus overcome; but all that he is required to do is to make out a *prima-facie* case, and, unless defendant rebut it, he is entitled to a verdict; for the defendant must present its defense by evidence and instructions, and should there be any danger that the jury might overlook or misapprehend the force of the evidence given in its behalf, it should guard against such result by submitting proper instructions to be given in its own behalf.

Necessity of Instruction as to Degree of Care Required of Engineer where it is not shown that Fire was Caused by his Want of Skill.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that where the question does not arise as to whether a fire took place because of want of skill on the part of the engineer of defendant's locomotive, it is not incumbent on the court to charge that the care required of such engineer would be such as a person of ordinary prudence and caution, skilled in the particular business, would exercise under like circumstances.

Right of Company to Instruction Defining Negligence.—In *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 525, which was an action against a railroad company for negligently permitting the escape of fire from its right of way, the court failed to define negligence in its instruction, and it was held that it was proper for the defendant to request an instruction which would cover such omission.

Sufficiency of Instruction as to Liability of Company.—In *International & G. N. R. Co. v. Searight* (Texas, Nov. 7, 1894), 28 S. W. Rep. 39, which was an action against a railroad company for the destruction of grass by fire, negligently allowed by defendant to escape from its engines, the court instructed the jury: "If you believe from the evidence the fires in question originated from fire which escaped from defendant's engines, you will find for the plaintiff on this branch of the case, for, if the fire originated from fire which escaped from defendant's engine or engines, the burden of proof is on the defendant to show that the fire occurred without negligence on the part of the defendant; and the defendant having introduced no evidence to show that, if such fire originated from its engines, it was not guilty of negligence in the premises, you will find that such fires occurred through the negligence of defendant, if you find that it originated from fire which escaped from defendant's engine or engines. If from the evidence you do not believe that any fires mentioned in plaintiff's petition originated from fire which escaped from plaintiff's engine or engines, then plaintiff is not entitled to recover on account of grass destroyed by such fire or fires," and it was held that the instruction sufficiently stated the law of the case. *Citing* *Railway Co. v. Hogsett*, 67 Tex. 638; *Railway Co. v. Timmerman*, 61 Tex. 660; *Railway Co. v. Cusenberry*, 86 Tex. 525.

What Constitutes an Instruction on the Weight of Evidence.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that a charge to the effect that if cotton was ignited and destroyed by fire other than that communicated by a locomotive engine, or if the cotton was not set on fire by the sparks from the engine, or if it was set on fire by such

sparks, but not as the result of the negligence of the company, the company would not be liable, did not instruct the jury on the weight of evidence.

In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that an instruction which undertakes to call the attention of the jury to the particular fact that cotton is a combustible material, and that on this account a railway company should use a high degree of care, is objectionable as infringing the rule which forbids a charge upon the weight of evidence.

Immaterial Questions Bearing on the Degree of Care Required of Both Parties.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it appeared that cotton had been shipped over a railroad and had been delivered to a compress company, which placed it upon its own platform, whereby the connection of the railroad company with the cotton terminated; that the platform of the compress company was about 75 feet distant from and connected with the platform of the railroad company at a place agreed upon between both companies and for their mutual accommodation; and it was held that as the railroad company had no control over the cotton, the agreement between the companies that the platform should be located where it was had no bearing whatever on the question of care or degree of care necessary to be observed by both parties, and that therefore the question of the "consent or acquiescence" of the railroad company to the placing of the cotton near its track was properly omitted from an instruction bearing on the liability of the railroad company.

Propriety of Instruction as to Estoppel or Contributory Negligence in Absence of Evidence in Reference Thereto.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held, in an action for damages by fire alleged to have been set by a locomotive, that in the absence of evidence raising the question of estoppel or of contributory negligence it is proper to refuse to instruct the jury with reference thereto.

Unusual and Extraordinary Character of Wind as Bearing on Negligence of Company.—In *Blue v. Aberdeen & W. E. R. Co.* (N. Car., March 26, 1895), 21 S. E. Rep. 299, the testimony as to the nature and kind of the wind which prevailed at the time it was charged that sparks which caused the fire in question were blown from defendant's engines to plaintiff's land was varying and conflicting. Some of the witnesses described it in such general terms as "wind blowing in gusts, hard wind, blowing hard, wind blowing very hard, very windy, unusual wind, unusually and extraordinarily windy." As to the witnesses who testified to particulars, some said: "Wind would have blown hat fifty yards, sparks further." "Sparks from stack would have blown fifty or seventy-five yards." "Wind would have blown sparks one hundred or two hundred yards." At the request of the defendant company the court instructed the jury: "That the defendant could only be required to provide against usual and ordinary weather, and if the jury should find that the wind which caused the escape of the sparks and fire was unusual and extraordinary, and but for the unusual and extraordinary character of the wind the sparks and fire would not have escaped from defendant's engine, and would not have been communicated to plaintiff's premises, the defendant would not be guilty of negligence, and plaintiff could not recover;" and it was held that the instruction was too general, and that for error in giving it the judgment should be reversed. *Citing Emory v. Railroad Co.*, 102 N. Car. 226. 37 Am. & Eng. R. Cas. 253. The court said: "The instruction is all right so far as it goes, but the language used is too general. It contains no explanation to the jury as to the manner in which they were asked to consider the testimony, whether by comparison with other winds in the same climate or other seasons of the year, or whether to be taken in connection with that testimony which went into

the particulars of the wind or to be considered as independent proof. The words 'unusual and extraordinary,' as in common use, very often are exaggerations of speech, and in many cases, if properly inquired into and explained, would be found not to be synonymous with 'unnatural and unexpected.' And, further, the testimony in its particulars does not disclose any unnatural or unexpected wind. We think that his honor should have so explained the meaning of the words 'unusual and extraordinary,' in conjunction with the particular testimony offered, as to have presented the question whether or not this wind could reasonably have been anticipated and expected by the defendants in the climate and season and section of country."

Leaving to Jury Question Whether Fire was Direct and Natural Result of Escape of Sparks from Engine.—In *Frace v. New York, L. E. & W. R. Co.*, 143 N. Y. 182, it was held that an instruction was proper which left to the jury, as a question of fact under the circumstances, whether the burning in question was or was not the natural and direct result of the escape of sparks from an engine. The court said: "As there must be a new trial, the question of the liability of the defendant for the burning of the hotel will again arise. We think the charge of the learned judge upon this part of the case was as favorable to the defendant as it could properly ask. The question was left as one of fact, under all the circumstances, as to whether the burning of the hotel were not the natural and direct result of the sparks from the engine. In this case the court committed no error to the prejudice of the defendant. The Ryan Case, 35 N. Y. 210, should not be extended beyond the precise facts which appear therein. Even if correctly applied in that case, the principle ought not to be applied to other facts. See *Webb v. Railroad Co.*, 49 N. Y. 420; *Pollett v. Long*, 56 N. Y. 200; *Lowery v. Railway Co.* 99 N. Y. 158, 23 Am. & Eng. R. Cas. 276; *O'Neill v. Railway Co.*, 115 N. Y. 579, 40 Am. & Eng. R. Cas. 240."

Submission to Jury of Question of Negligence of Company in Adoption of System of Spark-arresters.—In *Frace v. New York, L. E. & W. R. Co.*, 143 N. Y. 182, it was held that where the proof showed that spark-arresters in use by a railroad company prevented the escape of sparks as well as any other kind known, it was erroneous to submit to the jury the question of defendant's negligence in the adoption of a proper system or kind of spark-arrester.

Damages—Materiality of Proof of Rental of Grazing Land in Action for Loss of Grass.—In *International & G. N. R. Co. v. Searight* (Texas, Nov. 7, 1894), 28 S. W. Rep. 39, it was held that in an action by the lessee of grazing land to recover for grass destroyed by fire set by a locomotive, the rental paid by the lessee is immaterial on the question of damages.

Establishment of Market Value of Grass Destroyed, by Opinion Evidence.—In *International & G. N. R. Co. v. Searight* (Texas, Nov. 7, 1894), 28 S. W. Rep. 39, which was an action to recover the value of grass destroyed by fire set by a locomotive, it appeared that the grass had no market value, and it was held, that it was competent to establish the intrinsic value of the grass by the opinion of persons familiar with the subject, derived from personal knowledge. Citing *Railway Co. v. Vancil*, 2 Tex. Civ. App. 427; *Railway Co. v. Ruby*, 80 Tex. 175; *Railway Co. v. Hogsett*, 67 Tex. 685; *Railway Co. v. Pickens*, 3 Willson Civ. Cas. Ct. App. § 398; *Railway Co. v. Maddox*, 75 Tex. 305, 42 Am. & Eng. R. Cas. 528.

Value of Land Before and After Fire—Variance.—In *St. Louis & S. F. R. Co. v. Spencer*, 149 Ill. 97, which was an action by a landowner against a railroad company to recover for injuries to fruit-trees and bushes, alleged to have been caused by sparks from a passing engine, the plaintiff's declaration set out the destruction of the trees and bushes, and on the trial he was

allowed to prove the value of the land before and after the fire, and it was held that there was no variance between the allegation and the proof.

Opinion Evidence as to Damages.—In *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, it was held that opinion evidence as to the amount of damages sustained by a fire is inadmissible in the absence of any statement of facts upon which the opinion is based. *Citing* *Railway Co. v. Haynes*, 47 Ark. 497, 28 Am. & Eng. R. Cas. 572; *Railway Co. v. Lyman*, 57 Ark. 512. The court said: "A witness is never permitted to estimate the amount of damages which a party has sustained by the doing or not doing of a particular act. That is the province of the jury, and not of the witness. He may state the facts showing the extent of the injury, and any other pertinent matter, but the measuring of damages is not a fact, but matter of opinion or speculation."

Measure of Damages—Meadow Destroyed by Fire.—In *St. Louis & S. F. R. Co. v. Jones*, 59 Ark. 105, it was held that the measure of damages to a meadow destroyed by fire communicated by a locomotive is the cost of re-seeding it and its rental value from the time of the burning until its restoration. *Citing* *Vermilya v. Railway Co.*, 66 Iowa, 108, 23 Am. & Eng. R. Cas. 108; *Railway Co. v. Hixon*, 110 Ind. 225, 32 Am. & Eng. R. Cas. 374.

Destruction of Grass.—In *International & G. N. R. Co. v. Searight* (Texas, Nov. 7, 1894), 28 S. W. Rep. 39, it was held that, in an action for the destruction of grass by fire communicated by sparks from a locomotive, a charge was proper which informed the jury that the measure of damages would be "the reasonable value of such grass at the time and place where the same was destroyed for the use that plaintiff was then making of it, or might have made of it, and interest at six per cent per annum from the date on which the grass was destroyed."

Destruction of Fruit-trees and Berry-bushes.—In *Louisville, E. & St. L. C. R. Co. v. Spencer*, 149 Ill. 97, it was held that, in an action by a landowner against a railroad company to recover damages for the loss of fruit-trees and berry-bushes by fire communicated from one of the defendant company's locomotives, the measure of damages is the difference between the land before and after the fire, and in determining its value the jury may take into consideration the character of the soil and its state of cultivation, the kind and quality of the trees and fruit thereon, the age of the trees and fruit-bushes, and the injury caused by the fire, if any, to such trees and bushes.

Injury to Standing Timber.—In *Gordon v. Grand Rapids & I. R. Co.* (Mich., Dec. 28, 1894), 61 N. W. Rep. 549, which was an action to recover for timber destroyed and injured as alleged, by fire communicated by locomotives, it was held that, assuming that all the timber was burned, plaintiff could only recover the value of the standing timber or "stumpage." *Citing* *Skeels v. Starrett*, 57 Mich. 350; *Michigan Land & Iron Co. v. Deer Lake Co.*, 60 Mich. 143; *Ayers v. Hubbard*, 71 Mich. 594; *Miller v. Wellman*, 75 Mich. 353.

It was also held, as to timber actually destroyed, that the value of the stumpage would be the measure of damages; but as to trees which fell by force of the wind, for the reason that their roots had been injured by fire, the damages should be limited to the increased cost of cutting.

Destruction of Leaves, Trash, and Fences.—In *Central R. & B. Co. v. Murray* (Ga., Sept. 17, 1894), 20 S. E. Rep. 129, it was held in the official syllabus that, where growing timber, much of it young and immature, is destroyed by fire as a consequence of a negligent tort, and there is no depreciation in the market value of the land by reason of the destruction of the timber, the measure of damages is the value of the timber destroyed in its then state as attached to the land on which it grew, which value is to be ascertained by evidence as to what the owner of the premises could,

under all the circumstances, have realized from the timber destroyed, by appropriating it to use himself, to the extent of any demand for it made by his own wants at and about the time of the fire, and by selling it to others to the extent of any demand for it which then existed; the value to be reckoned at the worth of the timber as it stood upon the land when it was destroyed, not computing anything additional thereto for the increase which would have resulted from severing it from the realty, removing it to the place of use or sale, and putting it in condition to be used or sold.

Timber injured by the fire, but not destroyed, is to be dealt with on the same basis, to the extent of the difference between its value as it was before the fire and as the fire left it.

For leaves and trash which the fire consumed there could be a recovery to the extent that the owner could have used or disposed of the same in supplying any demand then existing or near at hand, the measure being the value of the raw material as it lay on the ground, not including in the quantity to be paid for any of the material which could not have been used or sold to supply the demand then existing, or which arose soon thereafter. For material which, had it not been destroyed, would have been mere waste in the woods, there can be no recovery.

For fencing injured or destroyed the recovery should be measured by the cost of restoring it and making its condition as good as that in which it was when injured or destroyed.

Statutory Interest on Damages—Instruction Directing Jury to Compute.—In *Uhe v. Chicago, M. & St. P. R. Co.* (S. Dak., Jan. 6, 1894) 57 N. W. Rep. 484, which was an action to recover damages sustained by a fire set by a locomotive, it was held that where by statute (Comp. Laws, § 4578) the giving or withholding interest is committed to the discretion of the jury, an instruction requiring the jury to compute interest on such damages, if any, as they might find for the plaintiff, was erroneous.

Discretion of Jury to Award Statutory Interest.—In *Uhe v. Chicago, M. & St. P. R. Co.* (S. Dak., Jan. 6, 1894), 57 N. W. Rep. 484, it was held, that in an action for the destruction of, or damages to, property negligently caused by fire communicated by locomotives, the giving or withholding of interest is, by section 4578, Comp. Laws, committed to the discretion of the jury.

Conclusiveness of Determination of Amount of Damages by Inferior Court.—In *Louisville, E. & St. L. C. R. Co. v. Spencer*, 149 Ill. 97, it was held that the supreme court would not review the quantum of damages recovered in an action against a railroad company for loss caused by fire, which it was alleged had been allowed to escape from its locomotives, since the amount of damages in an action for negligence is a question of fact, and the decision of the appellate court (in Illinois) in respect thereto is conclusive on the supreme court.

Who May Recover for Loss Sustained by Fire Communicated by Railroad Company—Lessee, for Damage to Nursery Stock which he had the Right to Remove.—In *Adams v. St. Louis & S. F. R. Co.* (Mo., Dec. 4, 1894), 28 S. W. Rep. 496, it was held that a lessee, who has planted nursery stock under an agreement with the lessor that he might remove the same, was entitled to recover of a railroad company for the destruction of such stock by fires set out by an engine or engines of the company.

Lessee Occupying Grazing Land under Oral Contract Void by the Statute of Frauds.—In *International & G. N. R. Co. v. Searight* (Tex., Nov. 7, 1894), 28 S. W. Rep. 39, it was held that in an action by the lessee of grazing lands to recover the value of grass on leased land destroyed by fire communicated to it by a locomotive, the fact that plaintiff occupied the land under an oral contract which was void under the statute of frauds,

would constitute no defense to the railroad company. *Citing Railway Co. v. Hettegast*, 79 Tex. 257.

Right to Recover for Loss of Hay in Creek Nation—Presumption as to Right to Harvest.—In *Eddy v. Lafayette* (U. S. Cir. Ct. App. 8th Cir., Feb. 15, 1892), 49 Fed. Rep. 807, which was an action in the Indian Territory to recover the value of hay alleged to have been set on fire by sparks from a locomotive used on a line under the control of receivers, it appeared that one of the plaintiffs was a member of the Creek Nation, and it was held that it would be presumed from the fact of the cutting and harvesting of the hay on lands of that nation, and the absence of anything to the contrary, that it was lawfully harvested.

Rights of Fire Insurance Companies—Right of Insurance Company which has Paid Loss to Recover of Railroad Company Under South Carolina Statute.—In *Mobile Ins. Co. v. Columbia & G. R. Co.* (S. Car., June 25, 1894), 19 S. E. Rep. 858, it was held that a statute (Gen. Stats., § 1511), which imposes upon railroad companies a liability for loss by fire communicated by their locomotives, and which allows the companies to insure property liable to be injured or destroyed by fire, not only enables a person who has sustained a loss to recover therefor, but insurance companies which have paid the loss and thereby have become subrogated to his rights may likewise sue to recover.

Validity of Assignment by Insured to Insurance Company of Claim Against Railroad Company to Extent of Loss Paid—Indivisibility of Claim.—In *Mobile Ins. Co. v. Columbia & G. R. Co.* (S. Car., June 25, 1894), 19 S. E. Rep. 858, it was held that since a cause of action against a railroad company for loss sustained by fire set by it is single and indivisible, an assignment by the assured of his claim against the railroad company to the extent of the amount paid by an insurance company to him, will not confer on the assignee company the right to maintain an action to recover of the railroad company its proportion of the damages resulting from the tortious act of the latter. *Citing Bank v. McLoon*, 78 Me. 498; *James v. Newton*, 142 Mass. 368.

Right of Insured Who has Assigned Claim to Insurance Company to Extent of Insurance, to Prosecute Suit for Benefit of Company.—In *Texas & P. R. Co. v. Levine* (Texas, Oct. 31, 1894), it was held that an insured who has been paid by an insurance company, and has assigned his claim against the railroad company to the insurance company, to the extent of the insurance, may prosecute a suit against the railroad company for the use and benefit of the assignee. *Citing Railway Co. v. Hall*, 64 Tex. 615; *Harris Co. v. Campbell*, 68 Tex. 22; *Railway Co. v. Freeman*, 57 Tex. 156; *Railway Co. v. Gentry*, 69 Tex. 625; *Smith v. Moseley*, 74 Tex. 631.

Method of Enforcement of Claim Against Railroad Company by Insurance Companies which have become Subrogated to Rights of Insured.—In *Mobile Ins. Co. v. Columbia & G. R. Co.* (S. Car., June 25, 1894), 19 S. E. Rep. 858, it was held that where several insurance companies have paid a loss occasioned by fire set by a railroad company, according to the several amounts required by their respective policies, and thereby become subrogated to the rights of the insured against the railroad company, by whose tortious act the loss has been caused, the proper mode of enforcing such rights of subrogation, irrespective of the provisions of the code, is by an action in the name of the assured for the benefit of such insurance companies, and that consequently, one of several such companies so subrogated has no right to maintain a separate action against the railroad company to recover its proportion of the loss sustained by the tortious act of the latter.

Payment by Railroad Company to One of Several Insurance Companies as Bar to Recovery by Other Companies.—In *Mobile Insurance Co. v. Columbia*

& G. R. Co. (S. Car., June 25, 1894), 19 S. E. Rep. 858, it appeared that a landowner who had sustained loss by fire set by locomotives was paid the amount of his loss by several insurance companies, and thereafter one of the companies brought an action against the railroad company to recover for the amount of loss paid by it and the latter allowed judgment to be taken against it, which it paid without an appeal, and it was held that the recovery and payment did not bar the other companies from a recovery against the railroad company for their proportion of the loss sustained.

Binding Effect on Insurance Company of Covenant in Lease to Warehouse Company Exempting Lessor Railroad Company from Loss by Fire Sustained by Latter.—In Savannah, F. & M. Ins. Co. v. Pelzer Mfg. Co. (U. S. Cir. Ct. D. S. Car., Feb. 26, 1894), 60 Fed. Rep. 39, it appeared that a lease of ground by a railroad company for warehouse purposes contained a covenant that the railroad company should not be in anywise responsible for loss occasioned by fire communicated by its locomotive engines, and it was held that the covenant was binding on an insurance company which had been subrogated to the rights of the warehouseman, although by Gen. Stat. § 1511, railroad companies are made absolutely liable for fires set by them.

BABCOCK, Adm'x.

v.

FITCHBURG R. Co.

(140 New York, 308.)

Sufficiency of Evidence to Charge Railroad Company with Liability for Explosion of Powder-mill by Suffering Fire to Escape from Locomotive.—Plaintiff's intestate was killed by the explosion of a powder-mill, which explosion was alleged to have been caused by sparks which escaped from the smoke-stack of one of the defendant's locomotives. It appeared that the mill was nearly 200 feet from the railroad track; that the locomotive in question was drawing a heavy train of cars upon an ascending grade, and emitting large volumes of smoke, which was carried by the wind then blowing towards the mill, and that, as the smoke settled down over the mill, an explosion occurred and wrecked the mill, into which the intestate had just entered. It further appeared that the mill had been in the same location for many years; was a wooden building, one story high, covered with tin, and painted with fire-proof paint; that there were no openings in it on the side towards the railroad; that all the openings therein were kept closed, except when persons working in the mill opened them; and that the railroad had been operated for 12 or 13 years with the same kind of locomotives without causing any injury to the mill. *Held*, that sufficient did not appear to show that the explosion resulted from sparks escaping from the locomotive.

PECKHAM, J., dissenting.

Sufficiency of Evidence to Establish Negligence of Company in Methods adopted by it to Prevent Escape of Fire from Engines.—The testimony was to the effect that other kinds of locomotives than the one alleged to have caused the injury had come into general use, but there was no proof that they were safer or less likely to cause fire. It was shown, however, that they emitted

fewer but larger sparks, and were brought into use because of greater efficiency and economy in the use of fuel, and not because they were considered safer. *Held*, that there was not sufficient to warrant a finding by the jury that the company was negligent in failing to use the best and most approved methods to prevent the escape of sparks from its engines.

O'BRIEN, J., ANDREWS, C.J., and MAYNARD, J., dissenting.

T. F. Hamilton, for appellant.

Martin I. Townsend, for respondent.

EARL, J.—The plaintiff's intestate, Fred Bennett, was killed on the 15th day of October, 1889, by the explosion of a powder-mill, and the claim of the plaintiff is that the explosion was caused by sparks which escaped from the smoke-stack of one of the defendant's locomotives, because it had not adopted suitable appliances to prevent the escape of the sparks.

Case stated.

The mill was nearly 200 feet from the railroad track, and the locomotive was drawing a heavy train of cars upon an ascending grade, emitting large volumes of smoke, which was carried by the wind then blowing towards the mill, and as the smoke settled down over the mill the explosion occurred, wrecking the mill, into which the intestate had just entered.

The mill had been in the same location for many years, and the railroad had been operated since the year 1876 with the same kind of locomotives, without causing any injury to the mill.

The mill was a wooden building, twenty feet square, one story high, covered with tin, and painted with fire-proof paint. There were no openings in the building on the side towards the railroad, and all the openings therein were kept closed except when the person working in the mill opened them. The mill was in operation only about six months each year, at intervals, as there was business for it.

The first question for the determination of the jury was whether the sparks from the locomotive caused the explosion.

Sufficiency of proof of cause of explosion. The sole evidence bearing upon this question is that Bennett was seen to enter the building a few moments before the explosion, and that the locomotive was approaching, emitting the smoke which was carried to and over the building, and as it settled down over the same the explosion occurred. Bennett was the only person in the building, and it does not appear what he was doing at the time. There is no evidence that any of the windows or doors of the building were open, or that there was then any occasion for having them open, or that there was any crevice or opening through which sparks could enter the building. Persons looking on from a distance saw the smoke, but no witness saw any sparks or cinders. It seems that

powder-mills are liable to explosion from defects in machinery, or the carelessness of men, as mills near this place had exploded 12 or 15 times in previous years, averaging a death of a human being at each explosion. Under such circumstances how could the jury find the cause of this explosion? The smoke settled down upon the building at the time, and Bennett entered the building a few moments before. There was the coincidence of the smoke settling down and the explosion, and also the coincidence of Bennett's entry into the building and the explosion. What caused the explosion, the sparks in the smoke or some act of Bennett? The jury might guess it was one or the other, and one guess might be more probable than the other, and still it would be a mere guess. There may be moral evidence quite convincing and sufficient to influence the conduct of men in some of the ordinary affairs of daily life which yet does not rise to the standard of legal evidence for the consideration of a legal tribunal, and sufficient to form the basis of judicial action. *McLoghlin v. National Mohawk Valley Bank*, 139 N. Y. 514. If there had been evidence that the explosion could have been caused only by fire passing or brought into the building from the outside, then there would have been some basis for the verdict. But there was no such evidence, and we know there could be none. If the natural tendency of the operation of the defendant's railroad was to endanger this mill by the sparks emitted from its locomotives, the case would be different. But the locomotives on this road had been operated for 13 years, under all conditions, in all kinds of weather, carrying long and short trains, and yet the powder-mill had never been destroyed.

The plaintiff was bound to show that the explosion was not caused by the carelessness of Bennett, and that it was caused solely by the fault of the defendant. It cannot be presumed that he was free from carelessness, and the burden was upon the plaintiff in some way to prove it. *Weston v. City of Troy*, 139 N. Y. 281.

Verdicts must stand upon evidence, and not upon mere conjecture, however plausible; and, if the situation be such that the plaintiff cannot furnish the requisite evidence, the misfortune is his. We think the plaintiff failed in this branch of her case. But she failed still more signally in another branch of it.

The engine which is charged with this explosion is a diamond stack, and it was such as had been, prior to about the year 1879, in universal use upon railroads in this country. About that time extension-front engines began to come into use, and in 1889, at the time of this accident, there is evidence tending to show that they were coming into general use. In a diamond-stack

Sufficiency of
proof of negli-
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engine the cinders pass through the flues into the smoke-box, and then are carried by the exhaust steam up the smoke-stack against an inverted cone, which acts as a deflector; and as they are deflected they are thrown up again and again until they are rendered quite small, when most of them are thrown through the wire netting across the smoke-stack above the inverted cone. This netting has four meshes to the square inch. By the operation of the deflector the tendency is to throw the sparks out of the smoke-stack to the sides of the road. In an extension-front engine there is a large smoke-box extending in front of the smoke-stack into which the largest share of the sparks are thrown. There they are agitated by the steam, and some of them are thrown out of the smoke-stack through a wire netting which has from two to two and a half meshes to the square inch. The sparks which pass into the smoke-box accumulate there in large quantities, and are, from time to time, when the engine stops, removed. Fewer sparks are emitted from the extension-front engines, but they are larger, and from such engines the sparks are thrown directly upwards. No witness testified that the extension-front engines were safer or less liable to set fires than the diamond stack. The only fact from which any inference can be drawn as to the comparative safety of the two engines is that in the diamond-stack engines more sparks are emitted, but they are smaller. The plaintiff seeks to charge the defendant with negligence solely upon the ground that it continued to use the diamond-stack engines, and had not converted them into extension fronts, the proof showing that the engine in question was in perfect condition, and that all the appliances of the diamond stack were in perfect order. To maintain her action she was bound at least to show the extension-front engines were safer and less liable to cause fires along the railroad than the diamond stack. This, we think, she failed to do. She could have proved, if her claim be well founded, by firemen, engineers, railroad superintendents, and mechanics, that in the operation of railroads the extension-front engines are less liable to cause fires than the diamond-stack engines. Upon this point there must be much experience and observation among railroad men, and there should be some proof upon the subject from which a jury could find the facts in reference to the comparative safety of the two kinds of engines.

But, still further, there is no proof in this case that the extension-front engine was invented or brought into use because it is safer or less liable to set fires than the diamond stack. All the witnesses who spoke upon the subject testified that the purpose of the extension front was to make the engine

more efficient by giving more draft, and for economy in the use of coal.

We will briefly call attention to some of the evidence. One of the plaintiff's witnesses testified that he had noticed "the coming out of sparks of the extension-front engines and diamond-stack engines many times." Another witness testified that "railroad managers are altering some of the old style of engines into the extension smoke-box for the very object of obtaining more area of netting. The purpose of this is to get a better draft through the flues;" that "the purpose of this greater area of netting in the extension front is to produce a better draft;" that "an extension front, by breaking up the coals and cinders, reduces their size so as to force them through the netting, depending upon the mesh of the netting altogether;" that "there is no difference between the throwing of sparks by the diamond-stack engines and the throwing of sparks by the extension-front engines, if the netting is intact and sound. There is no difference as to the quantity that will be thrown;" that "there is no reservoir in the extension front to hold the sparks for any length of time. There is considerable more space in an extension front to hold the sparks than in an ordinary smoke-box, probably double the quantity it will hold. As soon as it gets filled up to a certain extent it empties itself. It has got to thresh it through the netting to get out;" that "it breaks them up as it goes through the netting." Another witness of the plaintiff testifies that the difference between the two kinds of engines is that "the sparks do not go out so much from the extension front as they do from the old-style diamond stack. I have seen good-sized ones come out of an extension front, the same as I have from a diamond stack, but not so many. * * * Some of these sparks in the extension-front engine, that do not remain in the engine, go out. All go out that can get through the netting. The spark that goes out depends upon the size of the netting." Another witness for the plaintiff testified that "in the extension front the sparks and cinders that are not deposited in the machines go out of the stack, and the size of the stack depends upon the size of the mesh in the netting." A witness for the defendant testified that "the extension front is simply an elongation of the ordinary smoke-box, partially designed for more draft; that is, partially done to secure more draft. It is done for economy of repairs and economy of fuel." That "the economy I speak of was through a saving of fuel. We don't burn as much fuel in an extension-front engine as we do in the other. I think that is a well-accepted theory, and has been known to be such for some years." That "most of the cinders, coal, and ashes that pass

into this extension front is not worked up directly by that exhaust, but drawn up by induction through the netting, after working out and churning around in this front. Then they are caught by the exhaust, and thrown up pretty straight and high." That "I have seen more cinders taken from the diamond-stack engines than extension-front engines. The ordinary smoke-box in the diamond stack holds dead cinders." Another witness for the defendant testified: "I understand the purpose of the extension front to be to save coal, for one thing. It is lighter on the fire. It saves coal by not being so hard on the fire. It is lighter on the fire. There is a longer pull for a fire to get around, and isn't so direct."

We therefore are unable to perceive how it was possible for the jury, upon the evidence, to find that the extension-front engine is safer than the diamond stack, or that this accident would probably not have occurred if the extension-front engine had been used, rather than the diamond stack.

Our conclusion, therefore, is that the judgment should be reversed, and a new trial granted, costs to abide the event.

O'BRIEN, J. (dissenting).—The plaintiff has recovered damages against the defendant for causing the death of her son and intestate on the 15th of October, 1889. The deceased was at work in one of the mills of the Schaghticoke Powder Company, which was blown up, as is claimed, by a spark from one of the defendant's engines, thus causing his death. The mill in which the deceased was at work was situated on the northerly bank of the Hoo-sick river, and about 195 feet from the track of the defendant's road. The testimony tended to show that a freight train, composed of some 22 cars, was approaching in the direction of the mill, laboring hard upon an ascending grade, the stack of the engine emitting volumes of black smoke, which was carried by the wind towards the mill, over and around which it settled in what is described as a dense mass. When the train reached a point opposite the mill an explosion took place, which utterly destroyed the building, and plaintiff's intestate was instantly killed. The fact that the fire was communicated from the defendant's engine to the mill rests wholly upon circumstantial evidence, but it was of such a character as to warrant the jury in finding that the explosion was produced by sparks from the defendant's engine. It was shown that the train was laboring against an ascending grade of about 30 feet to the mile, requiring the frequent use of fresh coal, which was applied by the fireman, in order to furnish the necessary steam; the emission of black smoke from the stack in unusual quantities was described; the direction of

Dissenting
opinion.

the wind was favorable ; and when the smoke was seen to settle over the mill the explosion took place ; and no other cause for the accident was discernible, or even suggested. The screen of the smoke-stack was so constructed as to emit sparks and burning coals of considerable size, which could have reached the building from the engine through the wind and smoke.

It is sufficient to say, without further reference to the testimony on this branch of the case, that the origin of the fire which produced the explosion presented a fair question of fact for the jury upon all the facts and circumstances of the case, and we are concluded by the finding, and we must assume, as the jury have found, that the explosion was caused by a spark from the defendant's engine. But the defendant was engaged in using fire to propel cars by steam, under the sanction and authority of law, and it is not liable for any damage resulting from its use unless it was guilty of negligence. It was the duty of the defendant to use every reasonable precaution to prevent the injury ; and unless we can say, as matter of law, upon the evidence, that it has performed this duty, then the verdict must stand. The defendant was intrusted by the legislature with an agent for propelling its trains of an extremely dangerous character, and the law imposes upon it the duty of observing due care, which must always be measured by the degree of danger or the risk incident to the exercise of its powers. When it neglects or fails to adopt and use such precautions as may reasonably be expected, under all the circumstances, to prevent injury to the person or to the property of others, it becomes liable for the resulting damages.

It is urged in behalf of the plaintiff that the engine which the defendant used on the occasion, and which produced the accident, was so constructed as not to properly guard and control the sparks and cinders arising from the fires, and in this respect it omitted to perform the duty which the law imposed upon it of adopting every reasonable precaution against injury. The engine was what is known as the "diamond-stack engine," which is so constructed that the particles of burning coal set free from the mass, are driven by the air and the power of the exhaust steam against the netting or screen upon the top of the smoke-stack, until eventually they are forced into the air, in this way coals and sparks of sufficient size to communicate fire to combustible matter in the vicinity are frequently emitted from the engine. At the time of this accident there had been another engine in general and common use upon railroads, known as the "extension-front engine," which was so constructed that no particle of burning coal or other fire is driven in the first instance against the netting, but against a

metallic diaphragm in front of the fire, and never comes within the sweep of the exhaust steam, but falls into a vault or box at the foot of the stack, from which it is removed as occasion may require. There can be no doubt upon the evidence that by the use of this class of engines upon railroads the danger of communicating fire to buildings or property in the vicinity is very materially diminished. The evidence tended to show that these engines had been in general use since 1879, at least, by the great railroads of the country, and that the diamond-stack engines were turned into use in the yards as shifters. That the defendant had in use 8 or 10 of the former at the time of the accident, as against about 25 of the latter. The extension front not only greatly diminished the risk of fires, but it saved fuel, so that in the end it might be economy to adopt them. Assuming that the engine which the defendant had in use on the occasion of this accident, was, when first adopted, suitable for the purpose, or at least as safe as any then in use, the question arises with respect to its duty to the public to adopt safer and better appliances as they came into general use from time to time. The duty which the defendant owed to the public could not be discharged by adopting the new and safer appliances only when and as fast as the old and defective ones became worn out or otherwise useless. A railroad corporation, charged with such important duties to the public, does not exercise that degree of prudence or reasonable care which the law imposes upon it for the protection of life and property, unless, in its appliances and mode of operation, it keeps pace with human progress, and brings to its aid in every proper and reasonable way the improvements which science and human invention have placed within its reach. When new methods of preventing or minimizing the danger have been introduced, and are in general use for a reasonable time, prudent management and reasonable care require the corporation to take notice of that fact, and its use thereafter of old, inferior, or defective appliances may constitute evidence of negligence.

The measure of duty imposed by the law upon the defendant was thus stated by Judge FOLGER in *Steinweg v. Railway Co.*, 43 N. Y. 123: "The rule of law is that the appellant was guilty of negligence if it adopted not the most approved modes of construction of machinery in known use in the business, and the best precautions in known practical use for securing safety. If there was known and in use any apparatus which, applied to an engine, would enable it to consume its own sparks, and thus prevent the emission of them to the consequent ignition of combustible property in the appellant's charge, it is negligent if it did not avail itself of such appa-

ratus. But it was not bound to use every possible invention which the highest scientific skill might have suggested, nor to adopt an untried machine or mode of construction."

In that case, goods intrusted to the railroad as a common carrier were destroyed by fire communicated by a spark from the engine. The contract under which the corporation undertook to transport the property released it "from damage or loss to any article from or by fire or explosion of any kind." The court held, however, that this did not exempt the carrier from liability for loss by fire caused by its own negligence. The case turned, not upon any particular duty or obligation resting upon the railroad, or growing out of its contract, as a common carrier, but solely upon the question of negligence in omitting to adopt any known appliances in practical use which would enable an engine to consume its own sparks. The defendant in that case had been released from the special and peculiar obligations of a common carrier, and its liability for the destruction of the goods left to depend upon proof of its neglect to perform the general duty, which it owed to the whole public, of providing reasonably safe appliances for the conduct of its business. The principle, therefore, applies to the case at bar, and it has been applied in other cases where recoveries have been had against railroads for causing fires upon lands, or to buildings, fences, and property of a like character upon the line of its operation, by means of sparks or burning coals emitted from engines. *Fremantle v. Railway Co.*, 10 C. B. (N. S.) 839; *Crist v. Railway Co.*, 58 N. Y. 638; *Bedell v. Railroad Co.*, 44 N. Y. 367; *Webb v. Railroad Co.*, 49 N. Y. 420; *Searles v. Railway Co.*, 101 N. Y. 661, 25 Am. & Eng. R. Cas. 358; *O'Neill v. Railroad Co.*, 115 N. Y. 570, 40 Am. & Eng. R. Cas. 240; *Flinn v. Railroad Co.*, 67 Hun, 631, 22 N. Y. Supp. 473; *Bevier v. Canal Co.*, 13 Hun, 254.

In *Searles v. Railway Co.*, *supra*, the plaintiff recovered for an injury to his eye caused by a hot cinder which fell from one of the defendant's locomotives. The judgment was reversed in this court upon the opinion of Judge EARL, for the reason stated that "the undisputed evidence shows that all the appliances used upon the defendant's locomotives to prevent the escape of sparks and cinders were skilfully made and were the best known;" thus recognizing the principle. In *O'Neill v. Railway Co.*, *supra*, the plaintiff recovered damages caused by sparks communicated to woodlands from the defendant's engines. The judgment was affirmed in this court. One of the questions submitted to the jury was "whether the engine was supplied with the most approved method of arresting sparks in known use." The liability of the defendant in case

it was not was conceded in the motion for a nonsuit and in the disposition made of the case in this court. In all these cases the proof with respect to negligence was much weaker, in my opinion, than that presented by this record.

A railroad company, in the construction and equipment of its engines, is bound not only to employ all due care and skill for the prevention of injury to the person or property of others by the emission of sparks, burning cinders, or other cause, but it must avail itself of all discoveries which science or invention has placed within its reach for that purpose, provided they are such as under the circumstances it is reasonable to require it to adopt. But when the dangers to be avoided are insignificant or not very likely to occur, and the remedy suggested very costly and troublesome, or such as interferes materially with the efficient working of the engine, it becomes a question for the jury whether, under all the circumstances, the company could reasonably be expected to adopt it. 8 Am. & Eng. Enc. Law. pp. 3, 4.

In this case the learned trial judge submitted two questions to the jury: First, whether, from the testimony, the explosion was produced by sparks or burning cinders from defendant's engine entering the building through an open door or window, and coming in contact with the powder; and, secondly, whether the defendant exercised due care and caution in running its trains with an engine so constructed as to emit sparks, when a better and safer one was attainable and in general use, not only upon its own road, but others, generally, throughout the country. On the last question the jury were instructed that the defendant was not bound to use such appliances as the highest scientific skill can devise, yet it was bound to use such approved methods as had been adopted in the business, which were reasonably attainable by the company, and in general use, as to afford proper security to the lives and property of others. The jury were fully informed by the proofs as to the comparative merits and safety of the two engines, the danger of communicating fire to combustible matter on the line of the road, the time that the extension-front engine had been in general use, the saving in the use of fuel, and the additional expense involved in the change. In this state of the case the question whether the defendant did or did not perform the duty imposed upon it was not a question of law, but one of fact, for the jury; and, as it has been determined upon sufficient evidence in favor of the plaintiff, this court cannot disturb the verdict. The other exceptions in the record have been examined, and, as they do not disclose any legal error, the judgment should be affirmed.

FINCH and GRAY, JJ., concur with EARL, J., for reversal.

PECKHAM, J., concurs with EARL, J., on second ground and dissents from first ground of opinion.

ANDREWS, C.J., and MAYNARD, J., concur with O'BRIEN, J., for affirmance.

Judgment reversed.

Sufficiency of Evidence to Rebut Presumption of Negligence.—See *Jacksonville, Tampa & Key West R. Co. v. Peninsular Land Transportation & Manufacturing Co.* (Fla.), 49 Am. & Eng. R. Cas. 603, and note, 668.

Duty of Company to Prevent Escape of Fire from Engines—Extent of Duty—Right to Reasonable Time for Trial of and Experiment with New Contrivances.—In *Flinn v. New York C. & H. R. R. Co.*, 142 N. Y. 11, it was held that it was the duty of a railroad company to avail itself of the best mechanical contrivances and inventions in known practical use which are effective in preventing the burning of private property by the escape of sparks and coals from its engine, but that its duty in this respect is limited to such contrivances as have been already tested and put in use, and it is not required to use every possible contrivance, although patented and recommended in scientific discussions, but is entitled to reasonable time for trial and experiment before making the necessary changes.

Duty to Use New and Improved Spark-arresters.—In *Flinn v. New York C. & H. R. R. Co.*, 142 N. Y. 11, which was an action for the burning of a building by a fire alleged to have been set by the engine of a railroad company, it appeared that in 1874, the company laid a new track, which came within about 3½ feet of the building destroyed; that at this place there was a steep grade in its road, and in drawing trains up the grade, the engines emitted large quantities of cinders and sparks which frequently set fire to the building, and that in 1884 the building was destroyed by a fire started in such a manner; but there was no proof that the fire was caused by any defects in the engines, and up to the year 1880 the company had used upon its engines the most approved spark-arresters, and had put in force a regular system of daily inspection of smoke-stacks and spark-arresters. That in 1880 a new spark-arrester came into use which reduced the number of escaping sparks; that the company prior to the fire had used them on its freight engines, that before the trial of the present action the new system was general, although not in universal use; and that after that date the company operated a large number of engines, and it was held that the company was not chargeable with negligence in failing to introduce the new system of arresting sparks upon all its engines prior to the fire in question, in the absence of evidence that it was possible and reasonably practicable for it to do so.

Judicial Notice of General Use and Efficacy of Contrivances for Arresting Sparks.—In *Frace v. New York, L. E. & W. R. Co.*, 143 N. Y. 182, it was held that judicial notice will be taken of the fact that diamond-stack and straight-stack spark-arresters are in very general use upon the railroads of the country, and that they are both well-known systems for arresting sparks, while no system that has yet been invented can wholly prevent the emission of live sparks from an engine under certain circumstances.

Duty of Company as to Cotton near Track without Its Knowledge—Application of Rule Requiring Care to Avoid Injury after Discovery of Danger.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that where there is nothing to show that the danger of igniting

cotton from passing engines was known to railroad employes, or that it was imminent, the rule that the company would be liable notwithstanding the contributory negligence of the shipper of the cotton, or of a compress company to which it was consigned, if after discovering the danger it could, by the exercise of ordinary care have avoided the injury, is inapplicable.

Sufficiency of Instruction.—In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that an instruction that it is the duty of a railway company in the equipment and operation of its engines, to use ordinary and proper care and diligence to prevent fire from being communicated from such engine to the property of other persons, defining ordinary and proper care and diligence, and informing the jury that a failure to exercise the same is negligence, was a correct exposition of the law of negligence as applied to a railway company whose trains pass near places where cotton or other combustible material may be placed, and as applied to persons so placing such material near the track.

Liability of Companies for Damage by Fires Set by Engines—Liability when Due Care has been taken to Prevent Escape of Fire.—In *Savannah, F. & M. Ins. Co. v. Pelzer Mfg. Co.* (U. S. Cir. Ct. D. S. Car., Feb. 26, 1894). 60 Fed. Rep. 39, it was held that while the degree of care required of a railroad company as to the communication of fire by its locomotives is not clearly established by the books, yet where the evidence merely leads to the conclusion as an inference that a fire has been started by a locomotive, and the company adduces evidence showing that due care and precaution were taken on its part, there is not sufficient to charge it with liability. The court said: "A careful examination of the testimony shows that no direct and positive evidence has been adduced explaining, beyond question, the origin of this fire. The coincidence of the passage of the locomotive to and fro alongside of the platform filled with cotton and the outbreak of the fire leads to the conclusion, as an inference, that the fire may—perhaps must—have been started by a spark from the locomotive; and we may assume that this is the case. But, on the other hand, the testimony shows that every care and precaution was taken by the railroad company to prevent such an occurrence; care and precaution taken but a short time—not many minutes—preceding the disaster. All the proper appliances generally found effective in preventing sparks from flying were actually in use and in good order. If the fire did so originate, it was not from the want of care; that is to say, was not the result of negligence. As we have seen, the railroad company, not occupying the relation of common carrier to this cotton, was not its insurer against all accidents. What was the degree of care it should have exercised is not clearly established in the books. Judge WALLACE, on circuit, in an *obiter dictum*, seems to think that the rule in *Danner's Case*, 4 Rich. Law, 329, will be applied to all cases of injuries from railroad companies (*Gregory v. Layton*, 36 S. C. 94), but even then he holds that only the burden of proof is shifted, and that negligence could be disproved. Be this as it may, if, considering the circumstances of this case, and the great danger, from the hot furnace and fire of the locomotive, to cotton on the platform, we hold the company to extreme care,—*summa diligentia*,—the testimony for the defendant establishes that this was exercised. Nothing from the evidence on the part of the complainant disproves it. Under the rigid rule of *Danner's Case*, this would exonerate the railroad company."

In *Martin v. Texas & P. R. Co.* (Tex., June 4, 1894), 26 S. W. Rep. 1052, it was held that where an engine is properly constructed and provided with the most approved appliances for preventing the escape of fire, is in good condition in respect to the prevention of such escape, and is handled and operated with ordinary and proper care, the company is not liable,

even though a fire may have occurred by the escape of sparks from its engine.

In *Louisville & N. R. Co. v. Mitchell* (Ky., March 1, 1895), 29 S. W. Rep. 860, it was held that when a railroad company has brought itself clearly and conclusively within a statute requiring a screen, which is the best contrivance known to science to be used for the purpose of arresting sparks, and which also requires that the company shall be held to strict diligence in the use of the same, in seeing that it is in good order, perfect condition, and without defect, and which places the burden of proof on the railroad to show this care, diligence, and sufficiency of the machine, the result is that the company will not be responsible, if by accident fire does escape and causes serious damage.

Due Care in Operation of Train.—In New York, *C. & St. L. R. Co. v. Boltz* (Ind., Feb. 13, 1894), 36 N. E. Rep. 414, it appeared that the locomotive which it was claimed communicated the fire was equipped with the most approved and best-known spark-arrester, was in good repair, and was properly operated by a competent engineer, and it was held that no liability attached to the company in the absence of any proof of negligence on its part. The court said: "If the fire which destroyed the appellee's mill was communicated by sparks emitted from that engine, does it follow that the appellant is liable for the loss? Most certainly not, in the absence of negligence on the part of the railway company. The existence of negligence cannot be inferred from the mere fact that a fire follows soon after the passage of a train. *Railroad Co. v. Paramore*, 31 Ind. 143; *Railway Co. v. Hixon*, 110 Ind. 225, 32 Am. & Eng. R. Cas. 374; *Railroad Co. v. Ostrander*, 116 Ind. 259, 38 Am. & Eng. R. Cas. 346; *Ruffner v. Railroad Co.*, 34 Ohio St. 96. In the last of these cases it was said: 'The emission of sparks from such locomotives results from the mere use, and is as natural as it is common; therefore, it cannot be presumed, either as a matter of law or matter of fact, that the escape of sparks is caused by carelessness or negligence in the use. * * * It is not enough to show that the injury was caused by sparks escaping from a passing engine, without more. A party is not answerable in damages for the reasonable exercise of a right. A liability arises only when it is shown that the right was exercised negligently, unskilfully, or maliciously.' In *Railroad Co. v. Paramore*, *supra*, it was held that affirmative evidence of negligence was necessary, even where it appeared that the sparks caused the loss. It was there further held that every proprietor adjoining a railroad may lawfully deposit his property or goods, or erect valuable buildings on his own premises, in close proximity to such road, but in doing so he takes upon himself the risk of danger of fire being communicated thereto without the fault of the railroad company or its servants. The rule adopted in that case was expressly affirmed in the cases of *Railway Co. v. Hixon*, *supra*, and *Railroad Co. v. Ostrander*, *supra*; and in the recent case of *Railway Co. v. Schmidt*, 134 Ind. 16, 55 Am. & Eng. R. Cas. 128, the same principle was enforced in affirming the right of a railway company to use safety-valves upon its locomotives, though their use should cause injury to one passing near the railway."

In *Campbell v. Goodwin* (Texas, Nov. 5, 1894), 28 S. W. Rep. 273, it was held that in an action against a railroad company to recover for damages occasioned to the property of plaintiff by fire which escaped from an engine operated by defendant on its road, when plaintiff shows by proof that the fire escaped from the engine and set fire to his property, he is entitled to recover the damages shown to have been occasioned thereby, unless the defendant proves that the engine was provided with the best approved appliances for preventing the escape of fire therefrom; that the appliances at the time were in good repair, or that it had used ordinary care to keep

them in such condition; and that the engine was skilfully and carefully managed by its employes in charge thereof. *Citing Railway Co. v. Timmermann*, 61 Tex. 660; *Same v. Hogsett*, 67 Tex. 688; *Same v. Horne*, 69 Tex. 646, 35 Am. & Eng. R. Cas. 238; *Same v. Wallace*, 74 Tex. 584, 40 Am. & Eng. R. Cas. 248. The court said: "the law enjoins upon railroad companies the duty of providing its engines with the best approved appliances for preventing the escape of fire, and a failure to perform that duty constitutes negligence as matter of law. A charge which directs the jury to find for the plaintiff upon finding from the evidence that the fire escaped from an engine of the defendant and caused the damages alleged, there being no evidence to show a compliance by defendant with the legal requirement as to the equipment of the engine, is not a charge upon the weight of evidence, but simply gives to the evidence, which is *prima-facie* proof of negligence in the first place, that conclusive force which the law attaches to the failure of the defendant to make proof showing a compliance in that particular."

Liability of Lessor Company for Loss by Fire Communicated by Engines of its Lessee—South Carolina Statute.—Gen. Stats. South Carolina § 1511, imposing on railroad companies absolute liability for damages to or the destruction of property by fires set by their locomotives, does not render a lessor company liable for a loss occasioned by the communication of a fire by an engine owned and operated by its lessee. *Hunter v. Columbia, N. & L. R. Co.* (Mar. 14, 1894), 19 S. E. Rep. 197; *Lipfeld v. Charlotte, C. & A. R. Co.* (April 19, 1894), *Id.* 497. In the latter case the court said: "The true theory, as it seems to us, is that, while a railroad company cannot escape liability for any nonfeasance or misfeasance in the performance of any of its corporate duties to its patrons or the public, as was held in *Harmon v. Railroad Co.*, 28 S. C. 401, to which we still adhere, by leasing its road to another, yet the lessor company cannot be held liable for a tort outside of its corporate duties, in violation of the provisions of a special statute, penal in its nature at least, especially under the express phraseology of such statute."

Liability of Company for Loss by Fire Communicated by Engine as Affected by Exercise of Ordinary Care in Keeping Right of Way Free from Combustible Matter.—In *Campbell v. Goodwin* (Tex., Nov. 5, 1894), 28 S. W. Rep. 273, it was held that the fact that a railroad company may have exercised ordinary care in keeping its right of way free from inflammable matter will not excuse it from liability for the consequences, if guilty of negligence in the equipment of its engines, if fire escapes therefrom and burns up growing crops. *Citing Railway Co. v. Cusenberry*, 86 Texas 532.

Sufficiency of Proof to Show Cause of Fire.—In *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, which was an action against a railroad company for loss sustained by a fire set by one of its locomotives, it appeared that about an hour before the discovery of the fire, a train had passed, which was shortly followed by another train, the locomotives of which stopped at a place from which a high wind blew toward a platform some 60 or 75 feet away, upon which cotton was placed; that persons 200 yards distant in the direction of the wind smelled burning cotton, and in a few minutes fire was discovered near the bottom of two bales of cotton on the edge of the platform, which had burned a hole in the bales, and afterwards spread to adjoining buildings; and that it was a dry season, and the fire could not be traced to any other source than the locomotives. It further appeared that about three miles from the station the locomotive of the first train had discharged sparks which set on fire grass at a distance of 50 feet from the track, and it was held that the evidence sufficiently tended to show that the fire was caused by a spark or coal from either of the locomotives.

Sufficiency of Proof to Authorize Recovery.—In *Campbell v. Goodwin* (Texas,

Nov. 5, 1894), 28 S. W. Rep. 273, the testimony showed, without conflict, that sparks escaped from a passing engine, started a fire on the right of way of a railroad, and spread to plaintiff's land and burned his grass. No evidence was offered tending to show how the engine was equipped to prevent the escape of fire, nor how it was managed and operated on the occasion in question. There was testimony tending to show that the right of way, at the time in question, was reasonably clean and free from combustible matter, though there was other testimony to show to the contrary, and it was held that an instruction was properly given which informed the jury that if they believed, from a preponderance of the testimony, that fire escaped from an engine operated by defendant, and set fire to the grass in plaintiff's pasture, and destroyed any of the same, and injured the sod and turf of the land, as alleged in his petition, they should find a verdict for him, unless they should also find that he, by the exercise of ordinary diligence and prudence, could have extinguished the fire, and failed to do so.

Right of Recovery against Railroad Company of Loss of Non-insurable Property Under Statute Allowing Company to Insure Property along Line of its Road.—In *Adams v. St. Louis & S. F. R. Co.* (Mo., Dec. 4, 1894), 28 S. W. Rep. 496, it was held that the act of March 31, 1887 (Rev. Stat. 1889, § 2615), establishing the responsibility of railroad corporations, companies, and persons owning or operating railroads for damages by fires communicated by locomotive engines, and which gives such companies an insurable interest in property along their lines of road, authorizes the recovery of damages for injury to non-insurable property, and that hence a recovery may be had for the destruction of nursery stock by fire so communicated. *Following Mathews v. St. Louis & S. F. R. Co., ante, p. 432.*

McCLELLAN

v.

ST. PAUL, MINNEAPOLIS & MANITOBA R. CO.

(Minnesota Supreme Court, July 5, 1894.)

Joint and Several Liability for Damages caused by Fires Separately Started Mingling and Concurrently Destroying Property.—If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle and concurrently destroy property.

Sufficiency of Proof of Title to Land to Support Action for Destruction of Hay by Fire.—The plaintiff in this action, which was brought to recover the value of hay and railroad ties said to have been burned by a fire set by defendant's locomotive, claimed to be the owner of 60 tons of hay which was destroyed. He cut the grass, and made all of the hay. He was in actual possession, under claim of title, of the land from which he obtained 45 tons of the hay. *Held*, that it was not necessary for him to prove paper title to the land on which he cut the grass, and that, at least as to the 45 tons, he made a *prima-facie* case for recovery of its value.

Sufficiency of Evidence to Prove Setting of Fire which caused Damage.—*Held*, further, that the evidence was sufficient to justify the finding that

the defendant's locomotive set the fire which, by itself or in connection with another fire set about the same time, destroyed plaintiff's property.

APPEAL from Mille Lacs county district court.

George H. Reynolds, for appellant.

Bruckart & Brower, for respondent.

COLLINS, J.—The evidence in this case conclusively established that hay and ties claimed by plaintiff as his property were destroyed by fire about October 6, 1889. The
Evidence. fire had been raging for several days. The ties had been piled up for delivery to defendant company on its right of way, and were there destroyed, while the hay was in stacks upon a meadow not far distant. It was shown that some days before, about October 1st, a small fire was seen to break out on defendant's right of way, north of and close to the track, immediately after a freight train which had parted in two was coupled up at that point, and had proceeded on its way. The witness who first saw the fire was walking along the track behind the train, and, when he passed (about 15 minutes after the train started up), the fire was burning briskly, and running in a northerly direction. This witness saw the fire the next day, and it had then burned over quite an area. Another witness saw the fire about half an hour after it broke out, and, for several days afterwards, until it had reached the plaintiff's ties; was engaged with him in an effort to put it out. That this fire was not kept under observation during all of each of the nights which intervened between the day it was first seen and that on which the hay and ties were destroyed would not of itself prevent a recovery, if the testimony as to the manner and direction in which it seems to have burned was sufficient to satisfy the jury that, although left at times in the hope that it had been extinguished, it again broke out and resumed its way. And it evidently was sufficient.

Taking the evidence as a whole, it fairly established that the fire which was seen soon after the train passed, in close proximity to the track, and on the north side of it, spread in a northerly direction, and that the property in question was burned by it, unless the testimony of the two witnesses referred to and of other persons was completely rebutted and overthrown by that of the witness Dean as to another fire, which in no manner was shown to have been caused by defendant. He stated that, about October 1st, he went with some men in defendant's employ to fight a fire near which plaintiff's ties were burned, and found it burning on the south side of the track. The witness stayed there until the fire crossed the track to the north side,—that on which plaintiff's

hay was stacked and ties piled. As before stated, defendant was not shown to be responsible for this fire; so that, if the plaintiff's loss was solely the result of this fire, defendant was not liable.

We do not agree with counsel for defendant that the conclusion from the testimony is irresistible that the fire which was seen immediately after the train passed was that which crossed the track from the south to the north side. If both of these witnesses were to be believed, the fires were wholly separate,—one originating south, the other north, of the track; possibly about the same time, for it was a very dry and windy season of the year. We are of the opinion that, while the proof was not very convincing, it was quite sufficient to justify the jury in concluding that defendant's locomotive set the fire which, by itself or in connection with the other fire shown to have been started in that vicinity about that time, burned the hay and ties, especially in the absence of any testimony to the contrary. It was of the same character and fully as convincing as that considered sufficient in *Hoffman v. Railway Co.*, 40 Minn. 60.

The court was requested by counsel for defendant to instruct, in substance, that if there were two fires,—one starting on the south side of the track, with which the defendant was in no way connected, and one starting on the north side, with which the company had been connected,—both running in a northerly direction, towards the same place, at about the same time, the verdict should be for defendant. The court properly refused to so instruct. Both fires might start in the manner stated, both run in a northerly direction, towards the same place, about the same time, and yet wholly distinct and separate; one doing damage to plaintiff's property, the other having no part in the damage. The point argued by counsel in their brief as to this refusal was not raised by the request.

By the sixth assignment of error, counsel for defendant call attention to a part of the charge as to the liability of one party, to whom negligence in setting one fire has been traced, where two have met, mingled, and then destroyed property. The instruction complained of was really more favorable to their client than it should have been. If two fires have been set, the origin of one or both of which can be traced to the negligence of a party or parties, either or both of these parties can be held responsible for resulting damages in case the fires mingle. All of the legal consequences of being joint wrongdoers must follow, one being that each is liable to the full extent of the damages growing out of the wrongful acts; or,

Sufficiency of evidence to prove cause of injury.

Instructions.

Joint and several liability of a concurrent destruction of property by mingled fires.

as it is sometimes said, where the injury is the result of two concurring causes, one party is not exempt from full liability, although another party is equally culpable.

In the fifth subdivision of their brief, counsel for appellant contend that there was no competent evidence as to respondent's ownership of the hay, for the value of which **Proof of title.** the verdict was rendered. It was not necessary for the respondent to show paper title to the land on which the grass was cut from which the hay was made. He cut grass, and made 60 tons of hay, all of which was burned. He was in actual possession, under claim of title, of the land from which he obtained 45 tons thereof, according to his own estimate. As to this amount, at least, he made a *prima-facie* case for recovery, and appellant made no attempt to rebut it. Evidently, he was allowed by the jury the value of 45 tons of hay, and no more; the balance of the verdict being for the value of the ties and for interest. Judgment affirmed.

BUCK, J., absent, sick, took no part.

Proximate and Remote cause of Fires started by Railway Locomotives.—See Jacksonville, Tampa & Key West R. Co. v. Peninsular Land Transportation & Manufacturing Co. (Fla.), 49 Am. & Eng. R. Cas. 603, and note 668; Pennsylvania Co. v. Whitlock, 22 Am. & Eng. R. Cas. 629, and note, 637.

Duty of Railroad Company to Keep its Right of Way Free from Combustible Matter—*Duty as to Public Street Occupied by Company.*—In Lake Erie & W. R. Co. v. Middlecoff, 150 Ill. 27, it was held that so much of a public street as is used and occupied by a railway company constitutes its right of way within a statute requiring railroad companies to keep their rights of way free from dead grass, dried weeds, and other dangerous and combustible material.

Duty as to Cotton Placed on Platform near Track for Transportation.—In Tribette v. Illinois Cent. R. Co., 71 Miss. 212, it was held that the rule which requires a railroad company to provide against danger of fire to adjacent property by removing combustible or inflammable material from its tracks or right of way, does not apply where the danger arises from cotton stored in the usual way on its platform near its tracks, and which it is under a duty to receive.

Liability of Railroad Companies for Loss by Fires Communicated from Right of Way by Combustible Matter Thereon—*Liability for Neglect of Duty.*—In St. Johns & H. R. Co. v. Ransom, 33 Fla. 406, it was held that where the accumulation of combustible matter permitted by a railroad company to remain upon its road-bed and right of way is of such character as to render the small sparks that inevitably escape from its locomotives, despite the most careful use of the best-known and most approved appliances in common use for the arrest of sparks, themselves a source of danger and a constant menace to the adjacent property of others, then it is such company's duty to remove such matter, and keep its road-bed and right of way free thereof, and it is liable for its neglect of such duty when it results in damage to others. The court said: "The weight of the authorities agree that, while it is not negligence *per se* in a railroad company to allow combustible matter to accumulate or remain upon its right of way, still it may become negligence, when

taken in connection with other circumstances that render its presence there a cause of damage to others; and the facts of this case illustrate the principle of the rule. The proof is that the plaintiff's adjacent woodland had not been burned over for many years, and that consequently there was a large accumulation of leaves and decaying vegetable mould thereon that was highly combustible in dry seasons, and that it would quickly communicate a fire started herein near the defendant's road-bed to her improved premises. To this condition of affairs she repeatedly called the company's attention. Under these circumstances, owing to the apparent damage that would result to the plaintiff's premises in the event of a fire anywhere along the defendant's abutting roadway, it became the defendant's duty to render the chance escape there of fire from its engines less hazardous by a removal of the fire-feeding debris along its line; and, under the circumstances here, it was negligence on its part in putting it there, and in allowing it to remain until such debris became, within itself, the fruitful source of the plaintiff's injury. In *Jacksonville, T. & K. W. Ry Co. v. Peninsular Land, T. & M. Co.*, 27 Fla. 1. 157, 49 Am. & Eng. R. Cas. 603, we held that 'the degree of care required to be used in any given case to avoid the imputation of negligence must be according to the circumstances or in proportion to the danger,—such care as is ordinarily sufficient, under similar circumstances, to avoid danger and to secure safety.' While it may not be negligence in the defendant to permit accumulations of combustible matter along its right of way at points where a fire ignited therein by a chance spark from its engines would produce no injury to the neighboring property of others, yet, when its road passes near to the property of others that is so situated as to be patently exposed to damage by fire started on or near its right of way, it becomes its duty to lessen the hazard there of a fire from its agencies by keeping its right of way clear of fire-breeding accumulations; and, in the event of damage resulting from its neglect of this duty, it is responsible therefor. The accumulations of combustible debris, testified to in this case on the defendant's right of way, were such that the small sparks that, the defendant's witnesses themselves testified, inevitably escaped from locomotives, notwithstanding the most skilful use of the best-known appliances for their prevention, became a source of danger and a constant menace to the plaintiff's property; and, under the circumstances, it was the defendant's duty to guard against that danger by removing the accumulated debris that was the cause of it. The small sparks that inevitably escape from an engine when they fall upon ground clear of combustible matter will not ordinarily be productive of mischief, but the same sparks deposited among dry grass and leaves become as effectual an origin of conflagration as the larger cinders escaping from defective appliances. *Perry v. Railroad Co.*, 50 Cal. 578; *Troxler v. Railroad Co.*, 74 N. C. 377; 2 Ror. R. R. 791, 792; *Longabaugh v. Railroad Co.*, 9 Nev. 271; *Salmon v. Railroad Co.*, 38 N. J. Law, 5; *Railroad Co. v. Mills*, 42 Ill. 407; *Railway Co. v. Rogers*, 76 Va. 443, 8 Am. & Eng. R. Cas. 710; *Karsen v. Railroad Co.*, 29 Minn. 12, 7 Am. & Eng. R. Cas. 501; *Jones v. Railroad Co.*, 59 Mich. 437, 25 Am. & Eng. R. Cas. 482; *Railroad Co. v. Medley*, 75 Va. 499, 7 Am. & Eng. R. Cas. 493; *Kellogg v. Railroad Co.*, 26 Wis. 223; *Railroad Co. v. Overman*, 110 Ind. 538, 29 Am. & Eng. R. Cas. 161; *Railroad Co. v. Westover*, 4 Neb. 268; *Railroad Co. v. Salmon*, 39 N. J. Law, 299; *Gibbons v. Railroad Co.*, 66 Wis. 161, 25 Am. & Eng. R. Cas. 479, *Kesee v. Railroad Co.*, 30 Iowa, 78."

Damage by Fire to Land Separated from Track by Land of Other Person.—In *Black v. Aberdeen & W. E. R. Co.* (No. Car., Dec. 4, 1894), 20 S. E. Rep. 713, it was held that if a railroad company permits dead grass and straw, dried-up leaves, and an accumulation of combustible matter to exist on its right of way, so near the track as to collect fire from passing en-

gines, and it does collect fire from an engine, and the fire spread across the lands of the right of way and across the lands of another person to that of a person seeking compensation for loss sustained thereby the latter may recover the amount of his loss from the company. The court said: "The control which railroad companies have over the land covered by their rights of way is given to them that they may properly perform their *quasi* public duties. They have the authority to keep the land thus subjected to their use in such condition that their use of it will not endanger the property of others. Having this authority, they must exercise it, or else pay for such damage as comes to one who, himself being free from fault, suffers injury from a neglect to keep it in the required condition."

Degree of Care Required.—In *St. John's & H. R. Co. v. Ransom*, 33 Fla. 406, it was held that while it is not negligence *per se* in a railroad company to allow combustible matter to accumulate or remain upon its road-bed and right of way, yet it may become negligence when taken in connection with other circumstances that render its presence there a cause of damage to others. Where it is apparent that damage would result to the adjacent property of others in the event of a fire started anywhere along a railroad company's abutting road-bed, then it becomes such company's duty to render the chance escape there of fire from its engines less hazardous by keeping its road-bed and right of way clear of fire-feeding debris. It was also held, that the principle of the rule that "the degree of care required to be used in any given case to avoid the imputation of negligence must be according to the circumstances, or in proportion to the danger—such care as is ordinarily sufficient, under similar circumstances, to avoid danger and to secure safety," was applicable to the duty of a railroad company in keeping its right of way free of combustible matter.

Exercise of Due Care by Servants of Company.—In *Gulf, C. & S. F. R. Co. v. Cusenberry*, 86 Tex. 523, it was held that a railroad company which permits grass, weeds, or other combustible material to accumulate upon its right of way is not guilty of negligence *per se*, and if, in the work of clearing the right of way, an employé acts in a prudent and careful manner in starting a fire, no liability will attach to the company, notwithstanding it is negligent in allowing the grass to accumulate.

Fires Set by Laborers in Employ of Company.—In *St. John's & H. R. Co. v. Shalley*, 33 Fla. 397, it was held that where common laborers are employed and paid directly by a railroad company for the work of grading its road-bed, such work being taken in sections and paid for by the cubic yard, and such laborers are subject to the direction of the company's chief engineer or of its foreman in the mode and manner of doing the work, their pay depending upon the work being done according to directions, and they being subject to discharge when the work is delayed or imperfectly done, they are not independent contractors, but are the servants of the railroad company employing them, and such company is liable for the damage resulting to the property of a third person from fire negligently started by such laborers in the performance of the company's work.

Negligent Failure to Burn Off Fire-guard as Required by Statute.—In *Union Pac. R. Co. v. Gilland* (Wyo., Dec. 1, 1893), 34 Pac. Rep. 953, it was held that under Rev. St., §§ 1947, 1949, as amended by Laws 1890-1891, and which makes it the duty (Section 1947) of every railway company operating a line of railway within the state to burn, between the 1st of September and the 1st day of November in each and every year, as a fire-guard, all grass and vegetation growing upon its right of way for a distance not exceeding 200 feet on both sides of its road-bed, in such manner as to destroy the same, and prevent fires spreading therefrom to adjacent lands; and provides (section 1949) that every such railroad company "shall be liable for all damage by fire that is set out, resulting or caused by operating

any such line of road or any part thereof, when such railroad company has failed to burn a fire-guard, as provided in section 1947," no liability is imposed on a railway company for a fire occurring October 21st in a certain year, from failure to burn off a fire-guard, since the company had the unquestioned right under the statute to delay burning off its right of way until the thirty-first day of October.

Province of Court and Jury as to Negligence in Removing Combustible Matter from Right of Way.—In *Union Pac. R. Co. v. Gilland* (Wyo., Dec. 1, 1893), 34 Pac. Rep. 953, it was held that while it is a well-settled doctrine that a railroad company must keep its right of way reasonably clear of dangerous combustible matter, and that if a fire occurs in consequence of a negligent failure to do so, and loss thereby happens to another, the company will be liable therefor, yet it is equally as well and as correctly settled that the negligence of the company in failing to remove such dangerous combustible matter is always a question for the jury and not for the courts. *Citing* *Railroad Co. v. Stout*, 17 Wall, 657; *Jones v. Railroad Co.*, 59 Mich., 437, 25 Am. & Eng. R. Cas. 482; *Kessee v. Railroad Co.*, 30 Iowa, 78; *Gibbons v. Railroad Co.*, 58 Wis. 335, 13 Am. & Eng. R. Cas. 469; *Railroad Co. v. Butts*, 7 Kan. 308; *White v. Railroad Co.*, 31 Kan. 280, 13 Am. & Eng. R. Cas. 473; *Railroad Co. v. Mills*, 42 Ill. 408; *Railroad Co. v. Shanefelt*, 47 Ill. 497; *Railway Co. v. Medaris*, 64 Tex. 94, 29 Am. & Eng. R. Cas. 159; *Perry v. Railroad Co.*, 50 Cal. 578; *Railroad Co. v. Westover*, 4 Neb. 268; *Kellogg v. Railroad Co.*, 26 Wis. 223; *Railroad Co. v. Medley*, 75 Va. 499, 7 Am. & Eng. R. Cas. 493; *Pierce, R. R. p.* 434; *Redf. R. R.* 472; 1 *Thomp. Neg.* 162; 2 *Thomp. Neg.* 1235-1239; *Railroad Co. v. Van Steinburg*, 17 Mich. 118-124; *Railroad Co. v. Ives*, 144 U. S. 408, 55 Am. & Eng. R. Cas. 159; *Wines v. Railway Co.* 9 Utah, 228; *Leak v. Railway Co.*, 9 Utah, 246; *Van Ostrand v. Railroad Co.*, 19 N. Y. Supp. 621.

Negligence of Municipality in Allowing Accumulation of Grass and Weeds in Street as Affecting Liability of Company Using Street as Right of Way.—In *Lake Erie & W. R. Co. v. Middlecoff*, 150 Ill. 27, it was held that if the negligence of a municipality in allowing grass and weeds to accumulate in a street through which a railway passes is not of such a character as to render it liable for the destruction of adjacent property by a fire escaping from railway engines, the alleged negligence of the municipality will not lessen the liability of the railway company for setting fire to grass and weeds whereby the fire is communicated and injures adjoining property.

Sufficiency of Evidence to Warrant Recovery—Failure to Fix Specific Fire Causing Injury.—In *Megow v. Chicago, M. & St. P. R. Co.*, 86 Wis. 466, which was an action for injury by a fire alleged to have been set by the locomotive of a railroad company, it was held that a nonsuit was properly granted upon evidence which left it a matter of conjecture whether the injury was caused by the original fire started by the company 12 miles distant or by back fires started to prevent its spread.

What Constitutes Negligence—Allowing Accumulation of Cotton for Shipment—Failure to Provide Protection Against Fire.—In *Tribette v. Illinois Cent. R. Co.*, 71 Miss. 212, which was an action against a railroad company to recover for loss of cotton alleged to have been set on fire by one of two locomotives, it was held that the fact that the defendant allowed 168 bales of cotton to remain on its platform on Sunday did not constitute negligence, where it appeared such an accumulation at that season was not unusual, and that about half the quantity had been delivered the day previous for shipment. It was further held that the company was not chargeable with negligence because failing to provide tarpaulin for the cotton or special appliances for extinguishing fires, although the season was an unprecedented dry one, where it appeared that it simply followed the usual custom of the locality, which was well known to its customers, and that such precautions had not theretofore been thought necessary.

BRIANT

v.

DETROIT, LANSING & NORTHERN R. Co.

(Michigan Supreme Court, March 5, 1895.)

Erection of Wooden Building near Railroad Track as Constituting Negligence.—The erection or maintenance of a wooden building in close proximity to a railroad track does not constitute negligence *per se*.

Assumption of Special Risk by Erection of Wooden Building in Proximity to Railroad Track.—Where such a building has been erected near a railroad track, the owner is held to a knowledge of the risk incident thereto, and if there is special risk arising from no want of proper equipment of the engines of the railroad company, and the engines are properly managed, the risk will not be chargeable to the company, but is an incident to the situation, and for a loss by fire under such circumstances there can be no recovery.

Duty of Owner of Building Erected in Proximity to Railroad Track to Guard Against Fire—Preclusion of Recovery by Non-performance of Duty.—Where a wooden building has been erected in close proximity to a railroad track it is the duty of the owner to keep the premises free from combustible matter, and if a fire takes place by reason of his non-performance of this duty he cannot recover.

Same.—Failure of the owner to take all reasonable precautions against fire, in view of the proximity of his building to the railroad track, will preclude a recovery for a loss occasioned by such neglect.

What Constitutes Contributory Negligence—Absence of Owner with Knowledge of Dangerous Condition of Premises, because of Acts of Company's Servants, and Failure to Take Measures to Protect Same—Knowledge of Danger by Company.—The railroad company, by consent of the owner of the premises, removed an old platform, placed the material taken therefrom in a ravine lying between the building and the railroad track and covered it with sawdust and dirt. On the attention of the company's servants being called by the owner to the fact that they were constructing a fire-trap, promises were made to obviate the danger. Subsequently, and with knowledge of the danger, the owner left town and did not notify the company or take measures to protect his property, and in his absence the fire occurred. *Held*, that his right of recovery was not defeated, since he had the right to presume that the company would take measures to put the premises in a safe condition, and, moreover, he had no reason to expect that it would operate its engines with less care during his absence than at any other time.

ERROR to Montcalm county circuit court.

Smiley, Smith & Stevens, for appellant.

Fitzgerald & Barry (*Francis A. Stace*, of counsel), for appellee.

LONG, J.—This action is brought to recover the value of a planing-mill and machinery situate therein, which was destroyed by fire, originating, it is claimed, from the engines of the defendant in operating its train upon its tracks opposite the mill property, April 20, 1892. The plaintiff recovered verdict and judgment for \$4600. The evidence showed that the railroad was first constructed.

Case stated.

The defendant asked the court to instruct the jury that “the undisputed evidence shows that the railroad was constructed first, and the mill afterwards; that it was a wooden building, except that the roof was covered with iron; that by reason of its close proximity to the defendant’s tracks it was dangerous, and liable to take fire from engines upon defendant’s tracks; that in so constructing or maintaining his mill the plaintiff was guilty of negligence, and cannot recover.” It is contended by this request that it is negligence *per se* to build or maintain a wooden building near a railroad track.

Wooden structure near railroad track—
Negligence.

Counsel cite, in support of their claim, *Kendrick v. Towle*, 60 Mich. 363, 25 Am. & Eng. R. Cas. 473. In that case the mill was built prior to the time the railroad was constructed there; and it was held that the defendant had the right to build a railroad track, and conduct business thereon by running trains within 30 or 40 feet of the plaintiff’s mill; that it was a lawful, but a hazardous, business; and the care and caution of the owner of the railroad must be commensurate with, and in proportion to, the risk assumed.

In the present case the court charged the jury as to the degree of care the plaintiff must exercise as follows: “The plaintiff or his grantors having erected the mill in close proximity to the railroad track, * * * he must be held to have known of the risk incident thereto; and, if there was a special risk, arising from no want of care in the proper equipment and management of the engine in question, that risk is not chargeable to the railroad, but is an incident to the situation, and the plaintiff cannot recover.”

The court stated further: “The plaintiff having established himself along the line of the defendant’s right of way, and in close proximity to its track, where its locomotives would be expected to run, assumed all risk incident thereto; and, if this fire occurred from no want of care in the proper equipment and management of its engines and trains, then such fire is not chargeable to the defendant, and the plaintiff cannot recover.”

And again, the court said: “The plaintiff or his grantors having erected his mill adjacent to the right of way of the defendant, where the same was thus exposed to all risks inci-

dent to the use of engines near said premises, the obligation of care to prevent fire from such engines of the defendant from burning the mill of the plaintiff, by reason of catching in any combustible matter about such mill and upon the premises of the plaintiff in near proximity to such track, rested upon the plaintiff. And if the jury find that such fire was communicated to the mill by reason of the neglect of the plaintiff to comply with such obligation, the plaintiff would then be guilty of contributory negligence, and cannot recover."

And again, the court said: "The railroad had a perfect right to run and operate its trains in front of the plaintiff's mill, and was not guilty of negligence in so doing, and by law is not made liable for fires set in so doing, provided its engines, machinery, smoke-stack, and fire-boxes were in good order, and properly managed. * * * The law does not make the company an insurer that its engine will not set fire. If the machinery of its engines, their smoke-stack and fire-boxes, are in good order, and properly managed, that is all that is required, so far as the engines are concerned, to exempt the company from liability."

The court then stated to the jury that the charge thus far given had reference almost entirely to the rights and liabilities of the defendant under the statute, but that the statute was not intended to relieve a railroad company from its common-law liability for acts of negligence, and that, when the act originated from either of the causes mentioned in the statute, the burden is cast upon the railroad company to show it is free from negligence; and therefore: "It was the duty of the defendant to keep its track and grounds reasonably clear of combustible material; and, if the jury find that defendant negligently allowed combustible materials to be and remain upon its own grounds, and if, in consequence thereof, fire emanating from a locomotive engine ignited such combustible material, and the fire thus ignited spread to plaintiff's grounds and destroyed his mill, then defendant is in that case liable for all damage so incurred; and it is in that case no defense that the engine, its machinery, smoke-stack, and fire-box were in good order, and properly managed. * * * If the jury find that the fire in question originated from the engine number six, but that this engine, its machinery, smoke-stack, and fire-box were in good order and properly managed, that all reasonable precautions had been taken by the railroad company to prevent the origin of such fire, and that proper effort were made to extinguish the same when the existence of the fire was communicated to any of the officers of the company, the defendant is not liable, and the plaintiff cannot

recover in this action. * * * The law does not make the company an insurer that its right of way shall be kept so clean that fire cannot take upon it. All that it requires in regard to its right of way is that reasonable precautions shall be taken to prevent fires from originating upon it."

This charge, as given, stated the case under the law as fairly as the defendant was entitled to ; and there is no statement in *Kendrick v. Towle* which would have warranted the court in giving defendant's request to charge.

The same claim was made in *Alpern v. Churchill*, 53 Mich. 607. There the plaintiff erected her house after the mill was put up which caused the fire that destroyed her house. The contributory negligence claimed was that the plaintiff erected her building within a hundred yards or so of defendant's mill after this dangerous burner had been put up, and did not cover it with metallic roof. It was said : "She was dealing with her own property in a customary and perfectly lawful way, interfering with no one else, and neglecting no duty."

In the present case the plaintiff's mill was erected upon his own land. He took the precaution to put on a metallic roof for the purpose of guarding against fires of this character. It cannot be said to be negligence *per se* to erect such a building in close proximity to the railroad track ; but, as said by the court below, the plaintiff having erected it there, knowing the circumstances, he must be held to have known the risk incident thereto, and, if there was a special risk, arising from no want of proper equipment of the engine, and the engine was properly managed, the risk would not be chargeable to the defendant, but is an incident to the situation, and the plaintiff could not recover.

The court also by this charge instructed the jury that it was the plaintiff's duty to keep the premises free from combustible matter, and, if he failed to do so, and the fire happened in consequence, then he could not recover ; also, that if plaintiff failed to take all reasonable precautions against fire under the circumstances of his proximity to the railroad, and the fire happened in consequence of such neglect, he could not recover. Certainly the defendant had no reason to complain of this charge.

Assumption of special risk.

Duty of mill-owner to keep premises free from combustible matter—Preclusion of recovery by non-performance of duty.

In *Railway Co. v. Jones*, 86 Ind. 496, 11 Am. & Eng. R. Cas. 76, it appears that fire had been set by a passing engine to dry grass on the railroad right of way, which had then communicated to dry grass and combustible matter on plaintiff's adjoining premises, destroying his fences and grass. It was held that "the failure of plaintiff to remove the dry grass and

stubble from his own land to prevent the spread of fire was not contributory negligence on his part." This rule was followed in *Kellogg v. Railway Co.*, 26 Wis. 223. The rule is laid down in *Shearman and Redfield on Negligence* (section 31) as follows: "As there is a natural presumption that every one will act with due care, it cannot be imputed to the plaintiff as negligence that he did not anticipate culpable negligence on the part of the defendant. Nor even where the plaintiff sees that the defendant has been negligent, is he bound to anticipate all the perils to which he may possibly be exposed by such negligence, or even to refrain absolutely from pursuing his usual course on account of risks to which he is possibly exposed by defendant's fault." This doctrine is held in England, as stated in *Vaughn v. Railway Co.*, 3 Hurl. & N. 743; *Clayards v. Dethick*, 12 Q. B. 439. The court was not in error in refusing the defendant's request to charge.

The court was also asked to charge the jury that: "If the jury find that the plaintiff, on Sunday preceding the 9th of April, 1892, before he left for West Superior, visited his mill premises, and found them in a dangerous condition, and likely to take fire, and that without notifying the defendant, or taking any action to protect his property, he left it, and went out of town on April 9, 1892, and remained away, then he was guilty of contributory negligence, and is not entitled to recover in this action."

The proofs showed the following state of facts as to the situation and surroundings of the mill and its proximity to the railroad tracks, and the knowledge of the plaintiff as to the situation: The plaintiff introduced several witnesses, who gave evidence tending to show the manner in which the building took fire. It appears that a platform had been constructed between the plaintiff's building and the defendant's side-track, made of planks, and that teams were accustomed to go upon this platform; that it became old, and in about February and March, 1892, the servants of the railroad company, with the consent of the plaintiff, removed this old platform, and threw the material of which it was constructed into a ravine which extended north and south under the platform, and between the mill and the defendant's side track. They partially filled up this ravine with the debris from this old platform, and put sawdust and dirt upon the top of it. It was contended by the plaintiff that sawdust and shavings were left upon the top of the material from the platform, and it was contended by the de-

fendant that this material had been covered with dirt and cinders.

There was a conflict in the testimony upon the condition in which the surface of the ground between the mill and the railroad track was left by the railroad company after tearing down the platform and covering, or partially covering, the space between the mill and the track. The plaintiff testified that he spoke to Mr. Fitz Patrick about it in February or March previous to the fire, and told him he was making a fire-trap there ; that they were putting sawdust and dirt over next to the track and in the ravine.

From the testimony of several witnesses for the plaintiff it appeared that the fire was discovered at or near the southeast corner of the shaving-room, between the railroad track and the southeast corner of the mill or shaving-room, and that it was seen there about the time, or immediately after, the train of the defendant, which had been switching upon the track and side-track immediately east of the mill, started from the depot of the defendant south upon the line of the road ; and that, just as the train was starting out of Stanton, the engineer and fireman both saw the fire burning on the ground on the defendant's right of way near the mill, but that they did not stop the train, or give any notice of the fire, until arriving at the next station ; and that immediately after the train left the fire was discovered by others, and that no other fire was in the neighborhood.

One of the plaintiff's witnesses testified that he was at the mill on the Sunday previous to the fire ; that his attention was attracted to the fact that on the east side of the shaving-room it had been graded down about two feet right next to the building, or a little under it ; that it looked as though it had been graded five or six inches under the edge of the shaving-room, and that near the corners shavings had run out, and that there was a barrel or two of shavings there, and that they had rolled down a little embankment, and that it was a very dry time.

Another witness for plaintiff testified that he was there in February or March, and saw the section-hands digging near the southeast corner of the shaving-room, and that he saw shavings near the corner of the shaving-room, scattered along. He also testified that he was there at the time of the fire, and that the fire was then burning in the corner of the shaving-room, on the outside. When he got there it was pretty near the roof, and he noticed the fire burning on the ground on the east and towards the railroad.

Another of plaintiff's witnesses testified that he was at the fire, and saw it burning near the southeast corner of the shav-

ing-room. He also saw the premises before the fire, and testified that there were shavings near the southeast corner of the shaving-room then, which had been scattered about by the wind.

On rebuttal the plaintiff was recalled as a witness in his own behalf, and testified that he went to West Superior, Wis., on the 9th of April, 1892, and that the Sunday before going he went to the mill in question; that the work was not finished; that he saw the roadway on top of the timbers, and refuse had been put in there, so that the shavings and sawdust were scattered about on top of the ground. The shavings were there on top of the ground, so that he considered it dangerous from fire; that it was a dry time; that he went away without leaving the mill in charge of any one except his family, who lived two blocks away; left no watchman nor any one there to look after the mill. He also testified that the shavings and sawdust were scattered about so that they appeared on top of the surface, and that he thought it was in a dangerous condition; that when he saw this condition of things in front of the mill he did not do anything towards fixing it; that he did not go to look at it again between the time and the time he went away to West Superior.

The defendant's witnesses gave evidence tending to show that the roadway between the mill and the track was in good condition, covered over with dirt and cinders; that the smoke-stack and fire-boxes of its engine were in good repair and perfect condition; and that the engine was properly operated at the time it was switching upon its tracks in front of the mill that day.

It appears that the defendant's servants had caused this exposed condition of the sawdust and shavings. They had placed them there, and had promised the plaintiff to cover them when their attention was called to their condition, and that it was making a fire-trap. It was upon defendant's right of way. This was in February or March, but after that they had covered a portion. When the plaintiff left for West Superior he had the right to presume that they would put their right of way in a safe condition. It is apparent that, had this been done, the fire would not have occurred, as it seems to have originated in this uncovered portion of the right of way. The refusal of this request to charge, under the circumstances, was proper.

Contributory negligence is where one acts so as to contribute by direct consent to or participation in the wrong complained of. *Moomey v. Peak*, 57 Mich. 259. In the above case it was shown that a steam-thresher was placed near the plaintiff's haystacks. Plaintiff was plowing in a

field near by, and made no protest. The wind was blowing, carrying the smoke from the thresher directly over the hay. After the evidence was in, the plaintiff asked the court to instruct the jury that "contributory negligence is where one so acts as to contribute by direct consent to or in participation in the wrong complained of, and if Moomey, the plaintiff, did not consent to what was done there on the day of the fire, or did not, by any act of his, participate therein, then he, in contemplation of law, did not contribute to the burning complained of." This was refused. It was held by this court that the request should have been given, and that there was no evidence fairly tending to fix upon the plaintiff the charge of contributory negligence.

In the present case the plaintiff was there the Sunday preceding the fire. The premises may have been in an exposed condition, but they were so put by the act of the defendant. There was no fire then on the premises. It is true that, if the fire had then been started, and the plaintiff could have extinguished it, he would have been in fault in not doing so; but he had no greater reason to expect that the defendant would carelessly run its engine past there at that time than at any other, and the condition was as well known to the defendant's agents as to the plaintiff.

The defendant further asked an instruction that under the evidence the plaintiff could not recover. We need not discuss this request. It was properly refused. There was evidence to go to the jury on the questions raised, and those questions were fairly submitted.

Plaintiff's counsel contends that under section 3378, How. Ann. St., the defendant was liable for the fire, and, if there had been any contributory negligence on the part of plaintiff, it would not prevent a recovery for the loss. In the view we take of the case, that question is not important. The question of the plaintiff's contributory negligence was fairly submitted to the jury under the proofs made, and they have found in his favor. We, therefore, need not pass upon that question.

The judgment must be affirmed.

HOOKE, J., did not sit. The other justices concurred.

Contributory Negligence of Property-owner in Neglecting to Guard Against Fire. See *Jacksonville, Tampa & Key West R. Co. v. Peninsular Land, Transportation & Manufacturing Co. (Fla.)*, 49 Am. & Eng. R. Cas. 603, and note, 668.

Contributory Negligence—Combustible Matter near Railroad Track. See *Patton v. St. Louis & San Francisco R. Co. (Mo.)*, 28 Am. & Eng. R. Cas. 364, and note, 369.

McCANDLESS

v.

RICHMOND & DANVILLE R. CO.

(38 South Carolina.)

What Constitutes an Exercise of the Police Power of the State--Imposition on Railroad Companies of Liability for Damages Caused by Fires.--Section 1511, Gen. Stats. imposing upon railroad corporations liability for damages caused by fires communicated by their locomotives, or originating within the limits of their rights of way, and giving to such companies an insurable interest in property along their lines of road for the loss of which they may be held liable, is not an exercise of the police power of the state.

Rights of Foreign Lessee of Domestic Railroad Corporation--Corporate rights exercised by a foreign lessee corporation in its management of the franchises of a corporation organized under the laws of the state as its lessor, are referable solely to the charter rights of the lessor company.

"Corporation" Defined--Subjection to Legislative Control.--A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law; being the mere creature of law it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence, and its business being affected with a public use, to that extent is subject to legislative action.

Amendment of Charter of Corporation by Legislative Enactment--Amenability of Company to Provisions of Section 1511.--By an act of the legislature (1841, § 41), it was declared that it should become part of the charter of every corporation which should subsequently receive a charter or any renewal, amendment, or modification thereof, unless the act granting such charter, renewal, amendment or modification, should, in express terms, except it. Thereafter, a charter was granted to a railroad company expressly excepting it from the provisions of the act, and subsequently the company so chartered consolidated with another company by an act providing therefor, which was silent as to such section. *Held*, that section 1511 of the Gen. Stats. became a part of the charter of the consolidated corporation.

Constitutionality of Act--Abridgement of Privileges and Immunities--Deprivation of Property without Due Process of Law--Denial of Equal Protection of the Laws.--Section 1511, in so far as it renders railroad companies liable in damages sustained by fires communicated by them, is not an abridgment or an interference with the privileges or immunities of such companies, nor is it a deprivation of property without due process of law, nor a denial of the equal protection of the laws, within the 14th amendment to the constitution of the United States.

Same--Impairment of Obligation of Contracts.--The section does not impair the obligation of contracts as between the companies and the state as evidenced by their charters or otherwise.

Same--Interference with Interstate Commerce.--The fact that the lessee company charged with liability under the section is a corporation formed under the laws of another state, does not make the section in so far

as it imposes a liability for damages by fire, an interference with the authority of congress over interstate commerce.

Same—Discrimination--Unlawful Dispossession of Property—Taking Property without Consent or Compensation.—The section is not violative of the provisions contained in the state constitution prohibiting discrimination, equal restraint and disqualifications, the dispossession of property otherwise than by the law of the land, or the taking of private property without consent or compensation.

McIVER, Ch.J., dissenting.

APPEAL from Chester county common pleas.

J. S. Cothran, for appellant.

I. K. Henry, for appellee.

POPE, J.—This action was commenced in the court of common pleas, for the county of Chester in this state, and came on for trial at the March term, 1891, of said court, before his honor Judge KERSHAW, and a jury. At the trial the plaintiff and defendant submitted to the court the following Case stated. agreement in writing: "The defendant consents to a verdict herein in the sum of one hundred dollars in favor of the plaintiff, provided that the court should determine that section 1511 of the general statutes is constitutional, it being admitted that the fire which destroyed plaintiff's property was communicated from defendant's locomotive. That if the court holds that said section of the general statutes is unconstitutional, then the verdict shall be for defendant."

Section 1511 of the general statutes of this state is as follows: "Every railroad corporation shall be responsible in damages to any person or corporation whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the limits of the right of way of said road, in consequence of the act of any of its authorized agents or employes, except in any case the property shall have been placed on the right (of way) of such corporation unlawfully or without its consent; and it shall have an insurable interest in the property upon its route for which it may so be held responsible, and may procure insurance thereon in its own behalf."

The presiding judge then charged as follows: "The parties in this case, admitting the origin of the fire to the sparks from defendant's locomotive, and the amount of damages sustained by reason thereof to be \$100, and that the same was communicated from the locomotive of the defendant without negligence, and the supreme court of this state, having held, in the case of *Thompson v. R. R. Co.*, 24 S. C. 366, that in such case, under section 1511 of the general statutes, the defendant would be liable, irrespective of any negligence, have agreed that a verdict shall be rendered in favor of the plaintiff for \$100,

unless I shall hold that said section 1511 is unconstitutional, so far as it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by its locomotive engines, without any negligence upon its part, and while in the prudent, careful, and proper operation of its road and franchises. I now charge you, gentlemen of the jury, that said section of the general statutes is constitutional in every respect, and is not contrary in any manner to the constitution of the state or of the United States, and is a proper exercise of the police power of the state by the legislature. Under the stipulation entered into by the parties hereto I must, therefore, direct that you find a verdict in favor of the plaintiff in the sum of \$100."

The jury rendered a verdict in favor of plaintiff for \$100, and judgment having been duly entered thereon the defendant now appeals to this court on the following grounds:

"The defendant, the Richmond & Danville Railroad Company excepts to the charge or ruling of the presiding judge in the above-stated case, that section 1511 of the general statutes of the state of South Carolina is constitutional, wherein it undertakes to make railroad corporations responsible in damages for property injured by fire communicated by their locomotive engines, absolutely and irrespective of any question of negligence, whereas, he should have held that said section was unconstitutional, so far as it undertook to make railroad corporations responsible for damages, irrespective of the question whether its conduct was proper or whether it was neglectful of duty.

"1, because said section contravenes the constitution of the United States, in that (a) It deprives railroad corporations of their property without due process of law, in violation of the 14th amendment. (b) Denies to railroad corporations within its jurisdiction the equal protection of the law in violation of the 14th amendment. (c) It impairs the obligation of the charter contract of the defendant, in violation of section 10, art. 1. (d) If interferes with the power of congress to regulate commerce among the several states, in violation of section 8, art. 1.

"2. Because said section contravenes the constitution of the state of South Carolina in that: (a) It subjects railroad corporations to restraints and disqualifications other than are laid upon other corporations and citizens of the state, in violation of section 12, art 1. (b) It discriminates between railroad corporations and other corporations and citizens of the state, by imposing upon them conditions and obligations, and subjects them to burdens different from those imposed upon other corporations and citizens, in violation of the same sec-

tions and article. (c) It imposes a new obligation upon railroad corporations for the benefit of another class of citizens when they are guilty of no neglect of duty, in violation of the same section and article. (d) It dispossesses railroad corporations of their property, under rule of law to which other corporations and citizens are not subjected, in violation of the same section and article. (e) It deprives railroad corporations of their property under a rule of law to which other corporations and citizens are not subjected, in violation of the same section and article. (f) It takes the private property of railroad corporations and applies the same to a private use, without the consent of said corporation, or a just compensation being made therefor, in violation of section 23, of art. 1."

We observe that the learned circuit judge has announced in his charge to the jury that section 1511 of the general statutes of this state was constitutional, because it was the exercise by the state of what is known in law as the police power of the state. In venturing to dissent from this view, as expressed by one for whose judgment we have so much respect, and in whose accuracy we have always with so much pleasure confided, candor, in the light of our official responsibility, requires that we should do so in this instance, no matter how distasteful it may be to us personally. We are aware that many eminent lawyers and judges have adopted the views of the circuit judge. But a careful consideration of the latest official declarations of this law by the supreme court of the United States have led us to modify our conceptions of what is involved in what is called the police power of the state, in this union of states. The fundamental idea, in ascribing such potency to this principle of the law is based upon the immutable principles of self-defense, a doctrine ever dear to the freeman in his individual status, and very precious to the affections of the people united in society, in an organized government; that, inasmuch as all rights of the state, not delegated expressly or by necessary implication to the General Government were reserved to the states, in their individual sovereignty, and that as all provisions in the laws of the United States were made upon the theory that this reserved right in the sovereign states was preserved intact, when any such laws of the United States contravened this principle, such principle would be preserved. To make our meaning clear, take this illustration: The constitution of the United States requires that no state shall pass any law impairing the obligation of a contract. Where a contract had been made by the state of Louisiana, whereby she invested a corporation, formed under her laws, with the exclusive privilege of having slaughter-houses in the city of New

Exercise of
police power.

Orleans, within that state, and yet a subsequent legislature of that state made another contract with another corporation, that directly impinged upon the first contract, and the question was finally carried to the supreme court of the United States, that august tribunal decided that the second contract was valid although it was in violation of the obligation of the first contract, and justified such legislature upon the principle of law known as the police power, which required the protection of the public health of the citizens of that state.

As we before remarked, in view of this and some previous decisions of that court, many lawyers and judges conceived that all questions relating to the exercise of the sovereign powers of a state by that state fell within this principle of the law. A moment's reflection will satisfy any one that such a broad doctrine would leave in its wake untold evils. Three cases finally reached the supreme court involving this principle. They are all to be found in the 115th volume of U. S. Reports, and are the *Louisville Gas Company*, the *Citizens' Gas Company*, p. 685; *The New Orleans Gas Company v. Louisiana Light Company*, p. 650; and *The New Orleans Water Works Company v. Rivers*, p. 674. Mr. Justice HARLAN delivered most carefully-considered decisions in the three cases, wherein he reviewed every decision of that court relating to the police power of the states, and announced the conclusion that there was a harmony in all of them, one with the other, and that such law only comprised questions pertaining to the public health, the public morals, and the public safety, and that the police power was confined within the limits of these three questions. It must be admitted on all hands, that the official declarations by a majority of the supreme court, is a final, conclusive, and authoritative declaration of the true construction to be placed upon the constitution and laws of the United States. Such being the result, we therefore cannot agree with the learned circuit judge here, in sustaining the constitutionality of this act of our legislature, on the ground that it is an exercise of the police power of the state.

But it by no means follows, that, being unable to agree to the reason assigned by the circuit judge in support of his charge to the jury, wherein he sustained his provision of the law as constitutional, we must reverse his judgment, for if there are any sound grounds in law for its support; we must do so. The assertion by him of the police power in the state was only a reason for his conclusion. It remains for us to consider the constitutionality of this part of the act of our legislature in other aspects. Does that section operate to defeat any of the provisions of the constitution of the United States, or of this state in any of the particulars complained?

We propose to discuss these matters not exactly in the line suggested by the grounds of appeal, but our discussion will ultimate in a consideration of the merits of each one.

1. It may be well to remark in the outset that the appellant here, in its separate individuality, is not a corporation created under the laws of this commonwealth. It is a creature of the laws of Virginia; but it has leased the Charlotte, Columbia and Augusta Railroad, and this railroad is a creature of the state of South Carolina. 11 Stat., 415; *Ibid.*, 526; 14 Stat., 232. Any corporate rights exercised by the appellant in its management of the franchises of the Charlotte, Columbia and Augusta Railroad Company, as its lessee are referable solely to the charter rights of its lessor.

Rights of
lessee com-
pany—How
determined.

No clearer definition of a corporation exists than that announced by Chief Justice MARSHALL, in the case of *Dartmouth College v. Woodward*, 4 Wheat. 518; "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." One of the rights conceded in this country to corporations, is that of being regarded as a person in the eyes of the law. *Charlotte, etc., R. R. Co. v. Gibbes*, 142 U. S., 386, and authorities therein cited in support of such proposition.

Corporation
defined.

The effect of the adjudicated cases on the subject of the charters conferred upon corporations operating railroads is, that railroad corporations are private corporations affected by a use in the public. They are formed for the benefit and convenience of the public, hence by law invested with special privileges. As public purposes are by them subserved, they are invested, to an extent limited in their needs, with the state's right of eminent domain. Their business being affected with a public use, to that extent is subject to legislative action. *C., C. & A. R. R. Co. v. Gibbs*; *Georgia, etc., Banking Company v. Smith*, 128 U. S. 174; 35 Am. & Eng. R. Cas. 511.

Legislative
control of
corporations.

As the charter of a corporation sets into existence the properties which it possesses, it may not be amiss at this point to examine the charter which the laws of this state have conferred upon, and which have been accepted by, the Charlotte, Columbia and Augusta Railroad Company. So far as the grant of the usual rights possessed by a railroad company, the charter in this instance is complete. We mean by this statement, that from the initial points of Augusta, Georgia, by way of Columbia, in this state,

Amendment
of charter of
corporation—
Effect of act of
1841.

to the city of Charlotte, in North Carolina, this corporation has had conferred upon it the usual properties possessed by railroads, but it may be proper to state that, in the act of the legislature of this state providing for its creation, any remuneration, secured by its terms, to the owners of the lands through which the right of way was to be obtained, only looked for compensation by such railroad to such landowners for the value of the property so taken by the railroad, such value being liable to be reduced by the consideration of the increased value lent to such lands by the railroad being built. In no case was there any provision for the injury that might accrue to such property by reason of fire being used by its locomotives. This railroad company was made up by the consolidation of the Charlotte and South Carolina Railroad Company with that of the Columbia and Augusta Railroad. The first had been chartered in 1846-48, the second some time during the year 1858; the consolidation occurred in 1869, under an act of the legislature of this state.

The state of South Carolina, in 1841, made the following enactment: "Sec. 41. Be it further enacted, That it shall become part of the charter of every corporation, which shall, at the present or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall in express terms except it), that every charter of incorporation granted, renewed, or modified, as aforesaid, shall at all times remain subject to amendment, alteration, or repeal by the legislative authority." 11 Stat., 183. The act of 1846, providing a charter for the Charlotte and South Carolina R. R. Company, contained a clause especially excepting this corporation from such 41st section of the act of 1841. The act passed in 1848 made no reference to such section. The act providing for the consolidation as aforesaid was silent as to this 41st section of the act of 1841.

The effect of this section 41 of the act of 1841 has been construed by the court of last resort on constitutional questions—in the United States Supreme Court it has been made at least twice: *Tomlinson v. Branch*, 15 Wall., 460, and *Hoge v. Railroad Company*, 99 U. S. 348—in which last-cited suit, Mr. Justice FIELD, as the organ of the court, said: "By the law of 1841, every charter of a corporation in South Carolina, subsequently granted, amended, or modified, was subject to repeal, amendment, or modification by the legislature, unless specially excepted from such legislative control in the act granting the charter, amendment, or modification. Such is evidently the meaning of the 41st section of that law, though

the intention is inaptly expressed. This construction is somewhat different from that placed upon it in *Tomlinson v. Jessup*, 15 Wallace, and gives the legislature a more extended control. But it is the construction to which a more careful examination of the language has led us. By it the legislature said, that subsequent charters should be subject to repeal or amendment, unless they were in express terms excepted from its control in the acts granting them; and that existing charters, if subsequently amended or modified, should stand in the same position. Its provisions constituted the condition upon which every charter was afterward granted, amended, or modified. They formed as much a part of the new or amended charter as if they had been originally embraced in it." Also, *Tomlinson v. Jessup*, 15 Wall. 454, in which the construction in *Hoge v. R. R. Company* as to the effect of section 41, was virtually given in these words, "The power reserved to the state by the law of 1841 authorized any change in the contract, as it originally existed, or as subsequently modified, or its entire revocation."

It is admitted, that a charter granted by a state to a corporation makes a contract between the state and the corporation and that a question as to impairment of that contract arises whenever a state, by subsequent legislation, seeks to alter the same against the will of the corporation, and that when such action of the state is questioned in law, the answer will have to be made, justifying such legislative interference with its contract by the state. It is contended here that the legislature of this state has no right by the enactment of section 1511 to interfere with her contract with the Charlotte, Columbia and Augusta Railroad Company. But does it not seem that this state makes perfect answer to the appellant here, when it shows that the party who accepted the contract contained in the act of incorporation, did so with a positive stipulation on the part of the state that if the railroad company ever accepted any alteration or modification of its original charter by an act of the legislature of this state, that thereafter it would be competent for the legislature to alter, modify, or repeal such contract, at the pleasure of the state. Such is the inevitable effect unless there should be placed upon the act in question some restraining hand by the 14th amendment of the Federal Constitution.

It is well-settled law that the laws which subsist at the time and place of the making of a contract and when it is to be performed, enter into and form a part of it as if they were expressly referred to or incorporated in its terms. *White v. Hart*, 13 Wall. 653; *Van Hoffman v. City of Quincy*, 4 *Id.* 535; *Edwards v. Kearzey*, 96 U. S. 601; so, when the state of South

Carolina made a contract by the grant to this railroad company all of her laws in existence at that time pertaining thereto, became a part of such contract. At the date of this contract, under the law as it then existed, in case injury resulted to the property of another by fire, communicated from the locomotive in use by the appellant, no damages could be recovered therefor, unless negligence—want of due care—by the railroad company was shown. *Thompson v. R. R. Co.*, 24 S. C. 366; *Rodemacher v. The Milwaukee & St. Paul Railway Co.*, 20 Am. Rep. 600. Now the section 1511 of the General Statutes intervenes and changes that law, by extracting the matter of negligence and requiring the railroad company to answer for the damages resulting from fire arising from its locomotives, when it destroys the property of others. It adds, however, a provision allowing the railroad company to insure the property on its route against such loss resulting from fire communicated by its engines, or occurring on its right of way. Let it be remembered, that such a privilege to the railroads could not be secured when losses occurred from negligence.

The inquiry must now be made, as previously suggested, does this section contravene the 14th amendment of the Federal Constitution? In the case of *Minor v. Happersett*, 21 Wall. 171, where the effect of the 14th amendment was under consideration, Chief Justice WAITE, in announcing that court's decision, stated: "The amendment did not add to the privileges and immunities of a citizen. It simply furnished an additional guaranty for the protection of such as he already had." The language of the first section of this amendment in part, is as follows: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws." Where can it be pretended that in this section 1511, the State of South Carolina has attempted to abridge the privileges or immunities of citizens of the United States? Is there not provided in the section an absolute equality of all railroad companies? Was not the Charlotte, Columbia and Augusta Railroad Company one of its own creatures, deriving its life from her law? Care should be taken to restrict the views of this appeal, to the fact that it is really this railroad and no other that makes this question. We are not required to answer questions fanciful in their nature. Our duty is to confine ourselves and our judgment to the parties actually before this court. We repeat it, this appellant has

no other rights in this connection than those possessed by its lessor. And we fail to see how this section under discussion has abridged the privileges or immunities of such lessor through his lessee. The right to alter the contract existed before 1869; it existed in 1882, when this section was enacted. The right to control in determining the propriety of its alteration by the assent of the lessor was in the State; all that has been done has been to exercise that admitted right. The same course has been adopted by other states, and the courts of last resort in those states have been upheld in such legislation. *Rodemacher v. The Milwaukee & St. Paul Railway Company*, 20 Am. Rep., 592; *Lyman v. The Boston & Worcester Railway Corporation*, 4 Cush. 288. After all, what is the controlling motive in this legislation? It certainly is not animosity against railroad. Look at the facts underlying the exercise of this principle of law. The constitution and laws of every well-regulated community secure the enjoyment by every one of life, liberty, and property. A man owns property through which or near the place by the place where a railroad is constructed; the property of the man is destroyed by the fire communicated to the same by the railroad company. One man has lost his property through no carelessness of his own, and the railroad has destroyed that property through agencies necessary to the conduct of its business; the property of the citizen destroyed was not in the way of the proper conduct of the railway's business, but the fire set to it by the railroad company was while such property was off of its road-bed. Now, under all these circumstances, who shall suffer? In *Danner v. R. R. Company*, 4 Rich. 329, which was a case for negligence, and, of course, differs in that particular from a case at large, the court ruled the law in this state to be, that upon the proof by the plaintiff of the killing of his cattle by the railroad company, it was then incumbent on the railroad company to rebut by its proof the charge of negligence. This section goes only a step further, by holding the railroad company responsible for injuries to the rights of others, resulting from agencies set in motion by it, and which had escaped from the Railroad's control, so as to work an injury to the property of another, while such property was on its owner's premises.

The charge that this section takes the property of another without due process of law, cannot be successfully maintained. Here, there is no reference to the taking of the property of another. There is no compulsion used to this railroad, to allow the fire of its engine to escape and burn up the property of another, but the rather it incites care to prevent that result, by providing a penalty for a failure to do so. Granted that

the result is the payment of damages for the injuries aimed to be suppressed by this legislation, still it is only the result; no legislative provision vests the money of the railroad in the owner of property destroyed by the railroad. Nor do we see how it denies to this railroad the equal protection of the law.

Nor, from what has been already said herein, is there any ground to imply an impairment of the obligation of the contract. These matters are somewhat involved in the decision of the U. S. Court in the case of C., C. & A. R. R. Co. v. Gibbes, 142 U. S. 386, *supra*, and were all decided adversely to the railroad. As to the last, where it is suggested that this section interferes with the power of Congress to regulate commerce among the states, in violation of section 8, of article 1, we are utterly unable to perceive the slightest soundness in that position. The argument of the appellant is silent at this point. We apprehend that it must be a vast circuit that must be traversed, to make this suggestion of error available to the correction of this judgment of the circuit court.

2. (a) A rule of law ought to apply generally, that is true; that is, there ought to be no exceptive classes. What is the crime of murder in one man, ought, under the law, to be the same man in another man under the same circumstances. When a tax is levied upon a profession of law, one gentleman at the bar should be required to pay it just as do all the other members of the profession. One pilot should be allowed to collect the same fees as another pilot for similar services. One railroad should be subjected to a fine, or other penalty, for failing to blow its whistle at a crossing, just as all other railroads should be required to do. One railroad should be required to pay, on its gross earnings, a tax to pay the expenses of the railroad commissioners of this State, just as all the balance of the railroads in this state are required to do. Equality is equity. But when the law reaches out its strong arms and punishes the murderer, he should not complain that his other fellow-citizens, who have not committed murder, are not also hung. The lawyer, who pays a tax on his profession should not complain that a tanner does not pay a like tax. A commission merchant should not feel chagrined because a pilot collects fees for bringing a vessel into port, and he cannot. A railroad should not complain when it has to pay the expenses of the railroad commission, whose office it is to superintend its business, because a cotton factory, with whom the railroad commission has no business, is not required to pay its part of such taxes. And so with the balance. It is upon those common carriers, who have confided to them

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—Taking prop-
erty without
consent or
compensation.

Impairment of
obligation of
contracts -
Interference
with interstate
commerce.

valuable franchises of the state, on condition of a use by them of the public, and who operate railroads over a right of way contiguous to the property of others, with a flying locomotive whose sparks sometimes spread ruin to others—it is to the railroads who alone do this, that the law speaks, whether such railroads are operated and owned by one man, a partnership of men, or a chartered company. It speaks to every one alike. It is no respecter of persons. This exception is overruled.

(b) What is said in disposing of the objections indicated as “(a)” will apply with equal force to the objection now presented.

(c) The laws of this state reserved the right to change the contract. The legislature, in its wisdom, has acted. In our judgment, its action is not liable to be considered an error, as alleged.

(d) The short reference in “(c)” applies here as well.

(e) and (f) We are at a loss to perceive how this action of the state can be said to deprive or take the private property of railroads and give it another without the railroad’s consent, and contrary to law, especially to the constitution of this state. A little reflection, we are sure, will remove this difficulty. Where railroads are made to pay damages to persons whose persons or property they have injured, it cannot be said that such damages, though very unwillingly paid are taken from them contrary to law. It is the law when enforced that requires the damages paid. The provision of the statute creating the offense, for the commission of which the damages are adjudged to be paid, can, in no sense, be made to apply to the case suggested in these exceptions.

The grounds of appeal must all be dismissed. It is the judgment of this court that the judgment of the circuit court be affirmed.

Mr. Justice MCGOWAN.—I am not inclined to declare an act of the legislature unconstitutional unless it is clearly so. I concur in the result.

Mr. Chief Justice MCIVER (dissenting).—It being admitted that the fire which destroyed plaintiff’s property, sometime in July, 1890, had its origin in sparks escaping from defendant’s locomotive, and that the damages sustained amounted to one hundred dollars, the only question in the court below, and the only question raised by this appeal, is, whether section 1511 of the General Statutes comes in conflict with the provisions of the constitution of this state, or that of the United States. The section in question reads as follows: “Every railroad corporation shall be responsible in damages to any person or corporation, whose buildings or other property may be injured by fire communicated by its locomotive engines, or originating within the

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opinion.

limits of the right of way of said road in consequence of the act of any of its authorized agents or employés, except in any case where property shall have been placed on the right of way of such corporation unlawfully, or without its consent; and shall have an insurable interest in the property upon its route for which it may be so held responsible, and may procure insurance thereon in its own behalf." This section has been construed by this court, in the case of *Thompson v. The R. & D. Railroad Company*, 24 S. C. 366, as designed to eliminate the element of negligence, whenever a railroad company is sued for damages occasioned by fire communicated by its locomotives or originating upon the right of way, in consequence of the act of any of the authorized agents or employés of such company. So that the practical inquiry here is whether the legislature has the power to pass an act making a railroad company liable for damages done to the property of another, without fault on its part, and while in the lawful use of its own property. This question not having been raised or considered in Thompson's case, *supra*, is now presented for the first time, and must now be determined.

The general rule as I understand it, is that where one person, in the lawful use of his own property, happens to do some injury to the property of another, without fault on his part, he is not liable for the damages resulting from such injury. To make him so liable, it is necessary to show, not only the injury done, but also that it was due to some fault, either wilful or negligent, on the part of the person sought to be charged. This rule has been applied to cases in which the damages sustained resulted from fire communicated by sparks from locomotive engines running on railways. Cooley on Torts, 589-592, where that eminent author says: "The gist of the action is negligence." See, also, *McCready v. Railroad Company*, 2 Strob. 356, where WARDLAW, J., lays down the same doctrine. In addition to this, it will be found that the legislature has incorporated this principle in its legislation upon the subject of the destruction of property by fire, for by section 2497 of the General Statutes, as amended by the act of 1886, 19 Stat. 621 (which was the law in force at the time of the destruction of the property of plaintiff by fire), it is expressly declared, that whoever shall maliciously or negligently set fire to any combustible matter, so as thereby the woods, etc., of another be set on fire, shall be liable to indictment, and shall, moreover, be liable to an action for damages; and in the subsequent amendment, by the act of 1891 (20 Stat. 1125), the same element of negligence is retained. It seems, therefore, that the legislature, by the provisions of section 1511 of the General Statutes, has un-

dertaken to apply a much more stringent rule to railroad corporations than would be applied to all other persons under like circumstances.

Now, as it is properly conceded that corporations, in inquiries like the present, must be regarded as persons, it seems to me that the section in question is a violation of sec. 12, art. 1, of the constitution of this state, as well as of the 14th amendment to the constitution of the United States. In other words, it is class legislation, which it was one of the objects of those constitutional provisions to prevent. It subjects a railroad corporation to "other restraints or disqualifications" in regard to its personal rights than such as are laid upon others under like circumstances, and it denies to railroad corporations "the equal protection of the laws;" and it tends to deprive a railroad corporation of its property without due process of law, and merely by legislative declaration. For, as we have seen, where fire is communicated to the lands of another by sparks escaping from a locomotive engine of a railroad corporation, while passing over its track lawfully, as it has a right to do under the provisions of its charter, this legislation undertakes to make such corporation liable for any damage that may ensue, whether there is any negligence on the part of the corporation or not, while if the same damage is done by any other person to the property of another, he cannot be made liable without proof of some fault or negligence upon the part of the person causing the damage. It is true that class legislation may sometimes be vindicated as an exercise of the police power; but I agree with Mr. Justice POPE, that the legislation here under consideration cannot be vindicated as an exercise of the police power; and I need not undertake to add anything to what he has said, in his opinion, upon this subject.

It must be remembered that the question here is not as to the power of the legislature to enact laws for the proper regulation of railroad corporations in the exercise of the franchises granted to them, which would be readily conceded. The chapter of the General Statutes, in which the section under consideration is found, affords numerous instances of the exercise of such a power, which never have, and never can be, successfully questioned. But the question here is as to the power of the legislature to enact a law by which the liability of a railroad corporation for an injury done to the property of another, without fault on its part, while in the lawful use of its own property, shall be measured by a different rule, and determined by a different principle from that which would be applied to every other person, who, while in the lawful use of own property, should, without fault on his part, injure the

property of another, whereby in the latter case it would be absolutely necessary to show negligence in order to fix liability, while in the former it would not be necessary to show any negligence whatever.

Nor is this a question whether the legislature may not enact a law altering the rules of evidence, by declaring that where the property of a person is injured by fire caused by sparks escaping from a locomotive engine, proof of the injury from such a cause shall constitute *prima-facie* evidence of negligence, and throwing the burden of proof upon the railroad corporation using such locomotive of showing that there was no negligence; but, as I have said, the question, practically, is whether one principle of law can be applied to railroad corporations and another to all other persons, under like circumstances.

We have no case in this state directly in point; and it must be conceded that the authorities elsewhere are conflicting. It seems to me, however, that the cases which hold legislation, of the character of this now under consideration, as unconstitutional, are better founded in reason than those which hold the contrary. See *Zeigler v. S. & N. Ala. R. R. Company*, 58 Ala. 594; *County of San Mateo v. Southern Pacific R. R. Company*, 13 Fed. Rep. 722; *New Orleans, etc., R. R. Company v. Bourgeois*, 14 Am. St. Rep. 534 (66 Miss. 3); *Oregon, etc., Railway, etc., Company v. Smalley*, 1 Wash. 206, 22 Am. St. Rep. 143, 42 Am. & Eng. R. Cas. 550; *Chicago, etc., R. R. Company v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285.

It seems to me, therefore, that section 1511 of the General Statutes is clearly unconstitutional, and should be so declared.

Judgment affirmed.

Constitutionality of Statute Imposing on Railroad Companies Liability for Damages Caused by Fire.—See *Mathews v. St. Louis & S. F. R. Co.*, *ante*, p. 432.

Liability of Railroad Companies for Torts as Affected by Lease of Road.—See *Stickley v. Chesapeake & Ohio R. Co.* (Ky.), 52 Am. & Eng. R. Cas. 56, and note, 60.

Liability of Lessor Company for Torts of Lessee.—See *Arrowsmith v. Nashville & Decatur R. Co.* (Tenn.), 59 Am. & Eng. Corp. Cas. 79, and note, 96.

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Rebutting Prima-facie Evidence of Validity of Statute by Reference to Journals of Legislature.—The verification of an act by the signatures of the speakers of both houses and the approval of the governor, is *prima-facie* evidence of its validity, but the journals of either branch of the legislature may be referred to for the purpose of overcoming such evidence.

Validity of Statute—Irregularities in Bill before Legislature.—Whether a title to a bill introduced in the legislature be regarded as incorrectly designating the number of a section, or an amendment is regarded as making a change in the title, and neither the wrong designation nor the change are matters of substance, nor are calculated to mislead as to the subject of the bill, the one may be regarded as a merely clerical mistake in no wise impairing the validity of the law, and as to the other, it is sufficient to say that there is no provision of the constitution which requires a bill to preserve the same title through all its stages in both houses.

Validity of Amendment of 1879 to Statute Relating to Operation of Railroads—Stoppage of Trains at County Seats.—The act of 1879, amending section 25 of the act of March 31, 1874, relating to the operation of railroads, and which adds certain requirements as to the stoppage of trains at county-seat stations, was properly passed by the legislature in accordance with the requirements of the constitution.

Opinion Evidence as to What Constitutes a "Regular Passenger Train."—Whether a "fast mail train" is a "regular passenger train" within the meaning of a statute requiring regular passenger trains to stop at all stations at county seats for a reasonable time, cannot be proved by the opinions of witnesses, since the question is one of fact for the jury.

Definition of "Regular Passenger Train" Within Statute Requiring such Train to Stop at County Seat.—A "fast mail train" carrying passengers, equipped and operated and running upon a schedule the same as other trains, and differing from them only in the fact that it does not stop at all stations, is a "regular passenger train" within the meaning of a statute, requiring the stoppage of passenger trains at county seats.

Obligation of Company to Run Train to Established Station in County Seat which is a Terminus.—Where a railroad company has constructed its line through or into a county seat and has located a passenger station there, and maintained it for years, a statute requiring railroad companies to stop all regular passenger trains at stations in county seats requires the company to continue to go to such station and to stop its trains there, and its obligation to perform the duty is not affected by the fact that such station is the terminus of its line.

Right of Company to Change Established Location of Termini.—Where a railroad company has fixed the terminal point of its road in a town or city, it cannot afterwards change the location, since the discretion as to its termini or the selection of the intermediate points when once exercised, is exhausted, and it cannot thereafter change the location without legislative authority.

Same—Duty of Company to Operate Train as Continuous Line—Operating Transfer Trains to Established Terminus.—Where the charter of a railroad company requires it to operate its road as a continuous line, it will be compelled to operate the same to the point selected by it as one of its termini, and it will not have the right to treat the legal and actual terminus in a city as though it were on a side or spur track to be visited only with such cars or trains as it sees fit to send there, nor is the requirement of the law met by the use of short trains for transfer purposes.

Validity of Statute Requiring "Regular Passenger Trains" to Stop at County Seats—Interference with Interstate Commerce—Interference with Carriage of the Mails.—The proviso to section 25 of the act of 1874, as amended in 1879 (Rev. Stat., chap. 114, § 88), which requires all regular passenger-trains to stop a sufficient length of time at the railroad stations of county seats for the purpose of receiving and letting off passengers with safety, in so far as it relates to mail trains running through the state into other states, does not conflict with the provision of the federal constitution, which confer upon congress the power to regulate commerce among the states, nor is the proviso invalid as an interference with the carriage of the mails.

Right of State to Require Trains to Stop at County Seats as Affected by Acts of 1855 and 1867, Relating to the Operation of Railroad Companies.—The act of 1855 enabling railroad companies to enter into operating contracts, and the act of 1867 having for its object the facilitation of transfer and transportation, do not interfere with the right of the state to require railroad companies to stop their passenger trains at stations in county seats for a sufficient time to enable passengers to get off and on.

Same—Right of State as Affected by Federal Aid Extended to Railroad Companies, and by Arrangements with Postal Authorities.—The fact that a railroad company has been aided by congress for the purpose of establishing a line of travel through several states does not preclude the states through which the road passes from making all needful regulations of a police character for the government of the companies within their jurisdiction, and any arrangement such a company may have with the post-office department of the United States will not have the effect to preclude the state from passing reasonable police regulations affecting such company.

Right to Enforce Obedience to Statute by Mandamus.—*Mandamus* will lie to compel a railroad company to stop all its regular passenger-trains at county seats in accordance with a statute requiring the stoppage of such trains at such places for a reasonable length of time to enable passengers to alight and embark.

Sufficiency of Judgment to Compel Observance of Statute—Pleading and Proof—Waiver of Defects in Petition by Answer After Demurrer.—The pleadings and proof in a proceeding to compel stoppage of passenger trains at a county-seat station as required by statute, showed that a fast mail train was the only regular passenger train which failed to comply with the statute and the judgment directed the company to stop all its trains at such station. It further appeared that the company demurred to the petition upon the ground, among others, that the prayer was broader than the petition, and after the demurrer was overruled the company answered. *Held*, that there was a waiver of the demurrer, and furthermore that to support such a judgment it was not necessary to show that the neglect to comply with the statute extended to all the regular passenger trains of the company.

APPEAL from Alexander county circuit court.

Green & Gilbert, for appellant.

Lansden & Leek, for appellee.

MAGRUDER, J.—This is a petition for a *mandamus*, filed on April 17, 1891, in the circuit court of Alexander county, in the name of the people, by the state's attorney of that county, against the Illinois Central Railroad Company, to compel that company to cause all of its regular passenger trains coming into the city of Cairo to be brought down to the passenger station at the intersection of Second and Ohio Levee streets, in that city, and there stopped a sufficient length of time to receive and let off passengers with safety. Amendments were made to the petition, and a demurrer to the amended petition was overruled. Amendments were also made to the answer. The circuit court sustained a special demurrer to certain paragraphs of the amended answer, and, replications being filed to certain other paragraphs thereof, a jury was waived, and the cause submitted to the court for trial, by agreement, upon the issues of fact. The issues of fact were found in favor of the petitioner, and judgment was rendered in accordance with the prayer of the petition. From such judgment, the present appeal is prosecuted. Case stated.

One of the defenses made by the respondent below, and the disallowance of which is here assigned as error, was that section 88 of chapter 114 of the Revised Statutes, being section 25 of the act of 1874, in relation to fencing and operating railroads, as amended in 1879, did not pass the lower house of the legislature, and never became a law.

Section 25 of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874, read as follows: "Every railroad corporation shall cause its passenger trains to stop, upon the arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such trains, a sufficient length of time to receive and let off such passengers with safety." Hurd, Rev. St. 1874, p. 811, c. 114, § 63. Among the laws of 1879, printed by authority of law, and certified by the secretary of state, is the following amendatory act:

"An act to amend section 25 of 'An act in relation to fencing and operating railroads,' approved March 31, 1874, in force July 1, 1874." Approved May 29, 1879, in force July 1, 1879.

"Section 1. *Be it enacted by the people of the state of Illinois, represented in the general assembly*, that section 25 of an act entitled 'An act in relation to fencing and operating railroads,' approved March 31, 1874, in force July 1, 1874, be amended so as to read as follows:

"Sec. 25. Time of stop at stations. Every railroad corporation shall cause its passenger trains to stop, upon its arrival at each station advertised by such corporation as a place for receiving and discharging passengers upon and from such

trains, a sufficient length of time to receive and let off passengers with safety: provided, all regular passenger trains shall stop a sufficient length of time at the railroad station of county seats to receive and let off passengers with safety.' Approved May 29th, 1879." Laws Ill. 1879, p. 225.

The amendment of 1879 to section 25 of the act of 1874 was the proviso at the end of the section. It is claimed that the amendatory act above set forth was not adopted in accordance with the requirements of the constitution, and that, therefore, the said proviso is not now in force. The provision of the constitution which is alleged to have been violated in the passage of the act is the first clause of section 13 of article 4. That clause requires that "every bill shall be read at large on three different days, in each house."

It is not denied that the amendatory act received the signature of the speakers of both houses, and the approval of the governor. Such verification is *prima-facie* evidence of its validity as a legislative enactment. But it is the settled law of this state that the journals of either branch of the legislature may be resorted to for the purpose of overcoming such *prima-facie* evidence. It may be shown from the journals that an act was not passed in the mode prescribed by the constitution. *Spangler v. Jacoby*, 14 Ill. 297; *Turley v. County of Logan*, 17 Ill. 151; *Prescott v. Board*, 19 Ill. 324; *People v. Starne*, 35 Ill. 121. Accordingly, upon the trial below, the respondent introduced in evidence the official journal of the house of representatives of the thirty-first general assembly, and read therefrom so much as refers to said amendatory act of 1879. It was thereby proven that on March 25, 1879, Mr. Graham introduced house bill No. 833, a bill for "An act to amend 'An act in relation to fencing and operating railroads,' approved March 31, 1874, in force July 1, 1874," and the title was read, and the bill was referred to the committee on railroads. That, on March 26th, that committee made the following report: "The committee on railroads, to whom was referred house bill No. 833, being a bill for 'An act to amend section sixty-three of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874,' * * * report the same back to the house, and recommend that it do pass." That said report was adopted, and the bill ordered to its first reading. That, on March 27th, house bill No. 833, for "An act to amend section 63 of 'An act in relation to fencing and operating railroads,' approved March 31, 1874, in force July 1, 1874," was read at large a first time, and ordered to a second reading. That, on April 7th, house bill No. 833, for "An act to amend section 63," etc., as last above described, was read at large a

Presumption
of validity of
act—Rebuttal.

second time, and an amendment was offered and adopted, amending section 63, line 4, by inserting the word "passenger" between the words "regular" and "trains," so as to make it read: "Provided all regular passenger trains," and the bill was ordered engrossed for a third reading. That, on April 12th, the committee on enrolled and engrossed bills reported that "house bill No. 833, a bill for 'An act to amend section 63,' etc.," as last above described, had been correctly engrossed, and was therewith returned. That, on April 23d, "house bill No. 833, for 'An act to amend section 63,' etc.," as last above described, was taken up out of its order by consent, and the following amendment was offered and adopted: "Amend the title of the bill by inserting the words 'twenty-five' in lieu of the words 'sixty-three;' also amend the bill by striking out the words 'sixty-three' and figures '63' wherever they occur in the bill, and insert in lieu thereof the words 'twenty-five' and the figures '25.'" That the bill was thereupon engrossed for a third reading. That, on April 25th, the committee on engrossed and enrolled bills reported that "house bill No. 833, a bill for 'An act to amend section twenty-five of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874,'" had been correctly engrossed, and was therewith returned. That, on April 30th, "house bill No. 833, for 'An act to amend section sixty-three of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874'" (having been printed), was read at large a third time; and the question being, "Shall this bill pass?" it was decided in the affirmative,—“Yeas [names], 83; nays [names], 20. Ordered, that the title be as aforesaid, and that the clerk inform the senate thereof, and ask their concurrence therein.” That, on May 28th, the senate reported to the house that it had concurred with them in the passage of "house bill No. 833, a bill for 'An act to amend section twenty-five of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874.'" That, on May 29, 1879, the joint committee on enrolled bills reported that "house bill No. 833, 'An act to amend section twenty-five of an "Act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874,'" had been correctly enrolled, and had been on that day laid before the governor for his approval. That, on May 30th, the governor sent a message to the house, informing it that he had approved and signed "house bill No. 833, 'An act to amend section twenty-five of "An act in relation to fencing and operating railroads," approved March 31, 1874, in force July 1, 1874.'" "

The position of the counsel for the appellant is that a bill

numbered 833, for an act to amend section 63, etc., was read three times in the house, and passed by it, but that a bill to amend section 25 of the act in question was not read three times, nor passed by the house. It is therefore argued that the amendatory act of 1879, which was an act to amend section 25, never became a law. We are unable to concur in the view that the act of 1879 was not legally adopted.

The original act of March 31, 1874, in relation to fencing and operating railroads, contained but 39 sections when standing by itself, and apart from any other act upon the general subject of railroads. It was first published in the revision of the statutes issued in 1874, denominated the "Revised Statutes of the State of Illinois, A. D. 1874." Chapter 114 of this revision is entitled "Railroads and Warehouses," and contains a number of acts of the legislature upon those general subjects. In the arrangement of these acts in the chapter the original numbers of the sections of each separate act are retained; but new numbers are given to the sections of the various acts, taken as a whole, and considered as parts of the chapter. These new numbers run from 1 to 147, inclusive. It follows that each section in chapter 114 of the revision contains two numbers, one being the original number of the section in the original act, and the other being the number of the section as a part of a collection of acts constituting a chapter, with a common designation. By reference to the Revised Statutes of 1874 it will be seen that section 25 of the original act of March 31, 1874, is numbered 63 as a part of chapter 114. The section, as it there appears, has two numbers, to wit, 63 and 25. Both numbers were intended to designate the same subject-matter. It is easy to see how the committee who reported the amendment back to the house were misled into describing the section as section 63, in view of the fact that it was so numbered in the revision of 1874. There was in 1879 no other authorized publication of the act of March 31, 1874, except the Revised Statutes of 1874. Section 1 of an act to provide for the publication of the Revised Statutes of the state, approved March 30, 1874, in force on July 1, 1874, directed that, immediately after the close of the session of 1874, all the General Statutes of the state, which would be in force on July 1, 1874, should be compiled and published in a volume to be entitled the "Revised Statutes of the State of Illinois, A. D. 1874." Section 2 provided that the Revised Acts of 1871-72 and 1873-74 should "be notated so as to show, by proper reference, the original acts and sections therein." Section 17 directed that the secretary of state should print in pamphlet form the acts passed at that session

not embraced in the Revised Statutes, and that he should not include therein those published in the Revised Statutes. Rev. St. 1874, pp. 811, 1046.

While it was technically incorrect to designate the amendatory act in the title thereof as an act to amend section 63 of the original act, in view of the fact that said original act contained no section 63, yet, at the same time, there was a certain section of the original act which was designated as section 63 in the legally-authorized publication of the Revised Statutes of the state. The section so designated as section 63 of chapter 114 was the same as section 25 of the original act. There can therefore be no uncertainty as to what the legislature intended to amend, nor is it possible that any member of the legislature could have been misled by the title of the amendatory act. The great object of the rules and maxims of interpretation is to discover the true intention of the law; and whenever that intention can be indubitably ascertained from allowed signs, and by admitted means, courts are bound to give it effect. *Potter's Dwar. St.* p. 178; *County of St. Clair v. Bollman*, 15 Ill. App. 279.

The constitution provides that "no law shall be * * * amended by reference to its title only, but * * * the section amended shall be inserted at length in the new act." Const. art. 4. § 13. The section here intended to be amended was the section of the act of 1874 which had reference to the stoppage of passenger trains at stations; and that section, together with the proviso which constituted the amendment to it, was set out in full in the amendatory act, and was read on three different days in the house; and it will be presumed to have been read on three different days in the senate, as the record contains no proof to the contrary. *Larrison v. Railroad Co.*, 77 Ill. 11. It is not pretended that there were two different bills having the same number. There was but one house bill,—No. 833. This designation was kept unchanged in the passage of the bill through both houses, and was affixed to the act when it was reported as enrolled, and also when it was reported as approved by the governor. The identity of the body of the bill through every step, from its introduction in the house until it was finally declared a law, is thus sufficiently established. *Larrison v. Railroad Co.*, *supra*; *Plummer v. People*, 74 Ill. 361; *Walnut v. Wade*, 103 U. S. 683. After the second reading, the number of the section was changed by amendment from 63 to 25, and thereafter the bill came before the house four times as a bill to amend section 25. As the bill preserved its identity by holding its number,—"833,"—it cannot be said that it was not constitutionally passed. *Walnut v. Wade*, *supra*. Whether the title be re-

garded as incorrectly designating the number of the section, or the amendment as making a change in the title, neither the wrong designation nor the change were matters of substance, nor were they calculated to mislead as to the subject of the bill; and consequently the one may be regarded as merely a clerical mistake, in no wise impairing the validity of the law; and, as to the other, it may be said that there is no provision of the constitution which requires a bill to preserve the same title through all its stages in both houses. *Plummer v. People, supra*; *Walnut v. Wade, supra*. "An unessential false description can never defeat a grant, contract, or other instrument, nor would it defeat a statute." *School Directors v. School Directors*, 73 Ill. 249; *Binz v. Weber*, 81 Ill. 288.

2. The appellant claims that it has not violated section 88 of the railroad law by failing to run passenger trains to the station at Cairo, which is the county seat of Alexander county. In order to show that appellant was guilty of such violation, appellee introduced testimony to prove that a certain train, known as the "fast mail train," did not stop at the passenger station in Cairo. The company denies, and the people affirm, that the fast mail train was a "regular passenger train," within the meaning of said section 25 or 63, now known as "section 88" of the general law in regard to railroads and warehouses. *Starr. & C. Ann. St. c. 114, p. 1943*; *Rev. St. 1891, c. 114, § 88*.

In the year 1855 the appellant company completed the construction of its road, and located its regular passenger station or depot in what is now the city of Cairo, at a point something over a quarter of a mile from the junction of the Ohio and Mississippi rivers, known as the "intersection of Second and Ohio Levee Streets." This said station has been there maintained and continuously used for a period of more than 36 years. The city of Cairo was incorporated in 1857, and became the county seat in 1859. In the year 1859 a railroad bridge was built across the Ohio river about two miles north of said station, which bridge has been since used by appellant for the passage of its cars and trains over the river. The elevated approach to the northwestern end of the bridge, on the Illinois side of the river, was built by the appellant company. The foot of this approach is about 3 miles north of the station, and about 3000 feet north of the corporate limits of Cairo. The approach rises from the grade of the railroad, and is about 20 feet above the level of the ground when it reaches the corporate limits, and more than 50 feet above the ground when it reaches the northwesterly end of the bridge. The evidence shows that the fast mail train running from Chi-

cago to New Orleans passes over the bridge on its way southward, without going to or stopping at the station in Cairo.

The fast mail train was put upon the road about July 1, 1890. When it first began to run it left Chicago with a mail car and a baggage car. Afterwards it would leave that city with a mail car, a combination car, and a compartment car, the latter being "used for such passengers as chose to travel in it." The combination car was a baggage car and smoking-car combined. Upon reaching Champaign, the train would take on another coach for Jackson, Tenn. In January, 1891, it began to take on at Du Quoin still another passenger coach, from St. Louis to Cairo. About the time this suit was begun, the train was in the habit of arriving at Mounds Junction, some eight or nine miles north of the Cairo station, with a mail car, a combination car, a compartment car, and two regular passenger coaches. A short train would run up from Cairo, and meet the fast mail train at Mounds Junction, transferring to the latter passengers bound for the south from Cairo, and carrying to Cairo, on the return trip, passengers on the mail train desiring to go to Cairo. After the beginning of the present suit, the short train from Cairo would meet the fast mail train at Bridge Junction, three miles north of Cairo. The fast mail train, in crossing the bridge and the approach thereto on its way southward, passes through a portion of the corporate limits of the city. A part of the time, the fast mail train and the short train from Cairo would exchange engines at Mounds Junction or Bridge Junction. The fast mail train is a daily train, running on schedule time. There is proof that it will stop at any station between Du Quoin and Cairo to put off passengers holding tickets from St. Louis. The timetables and traveller's guide, as set out in the record, show that it is advertised by appellant as a passenger train, being train No. 41, and leaving Chicago at 3:15 A. M., with through coach to New Orleans, and a sleeping-car from Water Valley to New Orleans.

Under the facts thus detailed, we think the fast mail train was a "regular passenger train," within the meaning of the statute, although its main object, as originally organized, may have been the expeditious transportation of the United States mail from Chicago through to New Orleans. In *Chicago & A. R. Co. v. People*, 105 Ill. 657, where a train known as the "Kansas City Express," being a through train from St. Louis to Kansas City, failed to stop at Carrolton, the county seat of Green county, it was claimed that such express train was not a "regular passenger train," but we held it to be such, because it was equipped and operated in the same manner as

any other passenger train upon the road, and carried passengers and baggage as did other trains, and ran upon the official time-table of the company as other trains did, and only differed from other passenger trains in that it did not stop at all the stations. In that case we said: "The language of the act would not, perhaps, include a wild train, a freight train, an excursion train, or a special train; but where a train was engaged in carrying passengers, running regularly every day upon an advertised time-card of the company, equipped as all other passenger trains are, we are satisfied such a train was designed by the legislature to fall within the terms of the act — 'all regular passenger trains.' Had the legislature intended to except a fast train or a through train from the operation of the law, it would have been an easy matter to have framed the law in such a way that no doubt could have existed in regard to the intention, and, if such had been intended, language of a different character would no doubt have been used." To the same effect is *Ohio & M. Ry. Co. v. People*, 29 Ill. App. 561.

One of the witnesses of the company, upon the trial below, who was an assistant of appellant's second vice-president, was asked the question whether the fast mail train was a regular passenger train, but, upon objection made, was not allowed to answer. The refusal of the court to permit him to answer is claimed by the appellant to have been erroneous, but we think the ruling of the trial judge was correct. The witness was asked to decide the very question which the court, trying the case without a jury, was called upon to decide. A witness is not permitted to give his opinion as an expert in reference to a matter which does not involve a question of science, skill, or trade. To determine whether a train is a regular passenger train is not a subject which "so far partakes of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it." *Linn v. Sigsbee*, 67 Ill. 75; *Fire-proofing Co. v. Poczekai*, 130 Ill. 139, 22 N. E. Rep. 543. The opinions of witnesses should not be asked in such a way as to cover the very question to be found by the jury or court. *Chicago & A. R. Co. v. Springfield & N. W. R. Co.*, 67 Ill. 142. Where the matter inquired about requires a special knowledge, and may be determined by a jury, upon a sufficient description of the facts in regard to it, it is not proper to receive the testimony of experts. *Hopkins v. Railroad Co.*, 78 Ill. 32; *City of Chicago v. McGiven*, *Id.* 347; *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

3. Another proposition of the appellant arising out of the assignments of error is that the fast mail train did not come

within the purpose and intent and legal effect of the proviso of said section 88. If we understand the position of counsel upon this branch of the case, it is that section 88 has no application to the fast mail train, because that train does not go to or pass the passenger station at Cairo, but leaves the main line of the road three miles north of Cairo, and veers off to the southeast upon the new track recently constructed upon the approach to the bridge. In other words, the construction which counsel place upon the proviso to section 88 is that where the passenger train of a railroad company passes a passenger station at a county seat, on its way to some destination beyond the county seat, it must stop at the station long enough to receive and let off passengers, but that, if it is not necessary for such train to pass the station at the county seat, it is not obliged to go there or to stop there. This construction limits the proviso to a mere requirement as to the length of time during which trains must stop at railroad stations of county seats, in case they happen to pass such stations. If such is the correct view of the proviso, as applied to such a state of facts as is disclosed by the record now before us, every railroad company in the state which has been in the habit of stopping its passenger trains at such stations may turn them into some other track, at a point within a short distance of the station, and pass around the county seat altogether. We think that where a railroad company has constructed its road through or in a county seat, and located a passenger station there, and maintained such station for years, it is required by this proviso to continue to go there and to stop there; and its obligation to perform this duty is not affected by the circumstance that such station may be the terminus of the road.

It was so held by this court in *People v. Louisville & N. R. Co.*, 120 Ill. 48, 10 N. E. Rep. 657. In that case a depot in a county seat, which had been used as such for some 13 years, was abandoned, and a new depot was established outside of the corporate limits, to which an accommodation train was run from the county seat twice a day, to connect with passing trains; and it was held that it was the imperative duty of the company to stop all of its regular passenger trains at the old depot, and that such duty was "expressly enjoined by the eighty-eighth section of chapter 114 of the Revised Statutes." The following language was there used: "The fact that these trains may stop at the new depot, a quarter of a mile beyond the corporate limits of the town, does not relieve the company either from its common law or statutory duties in this respect. For this purpose the stopping of its trains miles

distant from the town would be equally available, unless it can be said, as a matter of law, that the stopping of a train a quarter of a mile from a place is stopping it at the place, which, of course, it cannot be. The very statement of the proposition involves an absurdity so gross in its character as to forbid serious consideration."

Section 2 of appellant's charter empowered it to conduct, maintain, and operate a railroad "from the southern terminus of the Illinois and Michigan canal to a point at the city of Cairo," etc. Adams & D. Real Prop. p. 1755. The selection of the point at the city to which the road was to be constructed was within the discretion of the company. The company fixed the corner of Second and Levee streets, or, as is claimed by counsel, a point 950 feet south of said corner, as the terminus of its road, and built a passenger station and depot at said corner, and laid its tracks to the depot, and stopped all of its trains there from 1855 to 1890, a period of 35 years. The discretion with which it was clothed as to the location of its terminus has been exercised. As was said in *People v. Louisville & N. R. Co.*, *supra*, in regard to McLeansboro, so may it be said here of Cairo: "During this time business interests have doubtless grown up and shaped themselves with reference to the location as originally fixed by the company. Property has no doubt been bought and sold upon the faith of the company's action, and it may well be assumed its value was effected more or less by it."

Where a railroad company has fixed the terminal point of its road in a town or city, it cannot afterwards change the location. *People v. Louisville & N. R. Co.*, *supra*; *Railroad Co. v. Suffern*, 129 Ill. 274, 21 N. E. Rep. 824. "The power of the company to determine its location, when once exercised, is exhausted. It may have a discretion as to its termini, or the selection of its intermediate points, or its route between certain fixed points; but, having exercised the discretion, it cannot change the location without legislative authority." *Pierce, R. R.* pp. 254, 255, quoted in *People v. Louisville & N. R. Co.*, *supra*.

The appellant company is required by its charter to operate its road as a continuous line to the point selected and used and maintained by it as the southern terminus of its road. It cannot make Mounds Junction or Bridge Junction the southern terminus. It had no right to treat the legal and actual terminus at the corner of Second and Levee streets, in Cairo, as though its station in that city was on a side or spur track, to be visited only with such cars and trains as it sees fit to send there. The requirement of the law is not met by

the use of short trains for transfer purposes. *Railroad Co. v. Hall*, 91 U. S. 343; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538; *U. S. v. Union P. R. Co.*, 4 Dill. 478; *People v. Louisville & N. R. Co.*, *supra*; *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. Rep. 347; *Railroad Co. v. Suffern*, *supra*. As the charter required the road to be built "to a point at the city of Cairo," and as the road was built up to a selected and designated point in said city, to wit, the corner of the streets above mentioned, and a depot was established there at the end of the line, "the defendant has no discretion as to which of its passenger trains it will stop there, and which it will not." *People v. Louisville & N. R. Co.*, *supra*. It may suit the interest or convenience of a railroad company that certain of its trains, destined for distant points in other states, and known as "through trains," should follow a new route, and pass around or away from one of its long-established depots, but such a mode of operating the "through trains," where the depot so established is both the railroad station of a county seat and the legal terminus of the original road in this state, amounts not only to an evasion of the proviso to section 88, but virtually, and in effect, to an abandonment of a part of the company's road. It was said in *People v. Louisville & N. R. Co.*, *supra*: "The fact that through business may be more remunerative than way business affords no justification for neglecting the way business; nor can the company abandon its road, or any part of it, without rendering its franchises liable to forfeiture."

4. It is also contended by the appellant that the enforcement of the proviso to section 88, to the extent of compelling appellant to operate its south-bound fast mail train down into Cairo; would conflict with section 8 of article 1 of the constitution of the United States, which confers upon congress the power "to regulate commerce * * * among the several states. That the proviso in question is not invalid, as being a regulation of interstate commerce, has been expressly decided by this court. In *Chicago & A. R. Co. v. People*, *supra*, it was claimed that if the statute was broad enough to include "through train" above mentioned, known as the "Kansas City Express," its effect was a regulation of commerce between the states, and hence was inhibited by the federal constitution; but we held that the statute did not undertake to regulate commerce between the states; that it imposed no restriction upon the introduction or transportation of any article of commerce, and was but a proper exercise of the police power of the state. The following language there used is applicable here: "This railroad company accepted

Proviso as
regulation of
interstate
commerce.

its charter upon the implied condition that its franchises would be exercised subject to the power of the state to impose such reasonable regulations as the comfort, safety, or welfare of society might require. * * * Did the act contribute to the comfort, safety, or welfare of the public. If it did, and did not deprive the company of any essential right conferred by its charter, its passage was a proper exercise of the police power. Cooley, Const. Lim. 577; Potter's Dwar. St. p. 458; Lake View v. Rose Hill Cemetery, 70 Ill. 191. In the enactment of the law requiring all regular passenger trains to stop at county seats, the legislature no doubt had in view the great benefit the public would derive in the increased facilities for reaching the county seat, to aid in the dispatch of business in courts, in the prompt arrest and prosecution of criminals who might be indicted in the courts, in the attendance of witnesses, grand and petit jurors,—indeed, the prompt and efficient transaction of all business in courts held at the county seat, and the facility for the examination of records in the state and conveyance of property. These and various other matters pertaining to the welfare of the public doubtless led to the enactment of the law," etc. The views thus expressed are sustained by the following cases: Stone v. Loan & Trust Co., 116 U. S. 307, 6 Sup Ct. Rep. 334, 388, 1191; Stone v. Railroad Co., 116 U. S. 347, 6 Sup. Ct. Rep. 348, 388, 1191; Smith v. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep. 564; Louisville, N. O. & T. Ry. Co. v. Mississippi, 133 U. S. 587, 10 Sup Ct. Rep. 348; Davidson v. State, 4 Tex. App. 545.

Counsel for appellant concede that section 88 is not a regulation of interstate commerce, if it be construed as merely requiring regular passenger trains which pass through county seats to stop long enough at the stations there to receive and let off passengers with safety; but it is claimed that the section is a violation of the federal constitution, and an interference with the federal government, if it be so enforced as to require a fast train carrying the United States mail, and on its way to New Orleans, through several states south of the Ohio river, to go to the regular passenger station at Cairo, and stop there long enough to receive and let off passengers with safety instead of proceeding over the Ohio river bridge without going to said station.

It is true that certain clauses of the act of congress of September 20, 1850, donating sections of the public lands to the state of Illinois to aid in the construction of the railroad which appellant afterwards built, and also a clause in the

charter granted to appellant by the state of Illinois in February, 1851, provide for the transportation of the government mail, and of any property or troops of the United States. 2 Starr. & C. St. p. 1980, c. 114, §§ 4, 6; Adams & D. Real Prop. p. 1759, § 19. But we apprehend that such arrangement as the appellant company may have with the post-office department of the federal government for the transportation of the mail cannot have the effect of abrogating a reasonable police regulation of this state. Sections 1 and 2 of the above-named act of congress grant land and right of way to the state of Illinois for the construction of a railroad "to a point at or near the junction of the Ohio and Mississippi rivers," and provide that "the construction of said road shall be commenced at its southern terminus, at or near the junction of" said rivers. Congress left it to the state, or to a company to be chartered by the state, to select the particular point at or near such junction which was to be the southern terminus. A subsequent contract with the post-office department would not authorize the appellant to abandon the use of any part of the road thus constructed to a point selected in pursuance of a discretion conferred by the federal congress. It was held by the supreme court of the United States, in *Stone v. Loan & Trust Co.*, *supra*, that, in case of a railroad whose construction had been aided by congress so as to establish a route of travel through several states, a state has the power to make all needful regulations of a police character for the government of the company operating the road within the jurisdiction of the state; and that among such regulations are those which require the company to stop trains at railroad crossings, to slacken speed through a crowded thoroughfare, and to do other things "affecting the comfort, the convenience, or the safety of those * * * entitled to look to the state for protection," etc. In *Smith v. Alabama*, *supra*, the same court said that "the rate of speed at stations and through villages, towns, and cities" was a matter of state regulation. If the requirement that the mail train go to Cairo, and stop long enough to receive and let off passengers with safety, interfere in any way with the carriage of the mail, it must be by reason of the delay supposed to be thereby created; but the amount and extent of the delay must be left to the state authorities to determine, subject to the qualification that such delay is not unreasonable. Requiring trains to stop at crossings, and to slacken their speed through cities and villages, creates delay. It does not appear that stopping at the Cairo station would create any unreasonable delay. On the contrary, the proof shows that a vestibule passenger train running from Chicago to New Orleans, which stops at the Cairo station, performs

the journey from Chicago to New Orleans within the same time as such journey is made by the "fast mail train."

It is true that section 7 of said act of congress grants the same rights, etc., which are granted to Illinois to the states of Alabama and Mississippi, in order to aid in the continuation of a railroad from the mouth of the Ohio river to Mobile; but the fact that congress has aided several states by the donation of public lands for the construction of railroads, which may eventually form one continuous line, does not relieve the companies operating such roads from the control of the states granting them their respective charters. In *Stone v. Loan & Trust Co., supra*, it was said that a railroad company was not relieved entirely from state regulation or state control in one state simply because it had been incorporated by, and was carrying on business in, the other states through which its road ran; that the corporation created by each state was, for all the purposes of local government, a domestic corporation, and subject to the constitutional authority of the state government; that the company, while in the state, would be governed by the state in respect to all things which had not been placed by the federal constitution within the exclusive jurisdiction of congress; that nothing could be done by the government of the state which could operate as a burden upon the interstate business of the company, or impair the usefulness of its facilities for interstate traffic; but that it was not enough to prevent the state from acting that the road therein was used in aid of interstate commerce; that "legislation of this kind, to be unconstitutional, must be such as will necessarily amount to or operate as a regulation of business without the state, as well as within." In *Smith v. Alabama, supra*, the federal supreme court again said: "It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial creations. They are constructed within the territorial limits of a state, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the state. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state."

Counsel refer to the act of the legislature of this state enabling railroad companies to enter into operative contracts, approved February 12, 1855, and to the "Act to facilitate travel and transportation, approved February 25, 1867, as in some way committing the state to a waiver of its control over railroad companies chartered by it which have connections with railroads operating in other states. We cannot see how these acts can

Effect of acts
of 1855 and
1867.

be construed as authorizing the results which are claimed to flow from them. The act of 1855 merely empowers railroad companies organized in this state to make contracts with railroad companies in other states for leasing or running their roads and for other purposes. The privilege of connecting with a foreign road does not impair the obligation to submit to the control of the state which has granted the charter, nor does it involve the right to change the established line or terminus of the original road. The act of 1867 provides for the connection of railroads with the rails of a railroad bridge in cases where such railroads "terminate at any point on any line of continuous railroad thoroughfare," and where the bridge is so constructed as to be a part of such thoroughfare. The act expressly provides that "by such connections no corporate rights shall be impaired." For acts of 1855 and 1867, see 2 Starr & C. St. pp. 1921, 1922. As we understand the act of 1867, it contemplates a case where the railroad, as extended to the bridge from its terminus, and the rails on the bridge, shall together constitute one thoroughfare. In the present case, however, the appellant has not extended its road to the bridge from the terminus at the corner of Second and Levee streets, in Cairo, but from a point three miles north of the terminus; hence the necessity for avoiding the terminus in reaching the bridge, if such necessity exists, has been created by appellant's own act in so constructing the approach to the bridge as not to make the legal terminus of the road a part of the continuous thoroughfare over the bridge.

5. It is urged by counsel for appellant that the writ of *mandamus* should have been refused by the trial court upon the alleged ground that the exercise of a sound judicial discretion would naturally lead to such refusal. If a clear legal right to the writ is shown by the party applying for it, he is entitled to its issuance. Railroad Co. v. Suffern, *supra*. We think such showing is made in this case. Mandamus.

It is said that the judgment is too broad in ordering appellant to stop all of its regular passenger trains at the Cairo station when it appears from the pleading and proofs that the fast mail train is the only regular passenger train which does not stop there. As it was the duty of the appellant to stop all of its regular passenger trains at said station, a violation of its duty was shown when the failure to stop one of such trains was proven. It was not necessary to show that the neglect to comply with the statute extended to all the regular passenger trains. The respondent demurred to the petition, upon the ground, among other grounds, that the prayer of the petition was broader than the petition itself. Its demurrer

was overruled, and it answered the allegations of the petition. There was thereby a waiver of the cause of demurrer. "The alternative writ stands in the place of a declaration, to which the return is an answer." *Silver v. Whitmore*, 45 Ill., 224. The respondent, having elected to try the case upon its merits, cannot now urge such an objection as this to the petition.

State Regulation of Railroads.—See *Hardy v. Atchison, Topeka & Santa Fe R. Co.* (Kan.), 18 Am. & Eng. R. Cas. 432, and note, 440.

Abandonment of Railroad Stations.—See *Florida Central & Peninsular R. Co. v. State ex rel. Mayor, etc.* (Fla.), 56 Am. & Eng. R. Cas. 306, and note 315.

Validity of Statute Requiring Stoppage of Trains at County Seats—Interference With Interstate Commerce—Application to Mail Trains.—In *State v. Gladson* (Minn., June 1, 1894), 59 N. W. Rep. 488, it was held that chapter 60, Laws 1893, requiring railroad companies to stop all regular passenger trains at county seats, is not unconstitutional or void, either as being an unreasonable regulation or as interfering with interstate commerce.

It was also held that the statute is not void as to a train carrying United States mail, which also carries passengers between points within the state. The court said: "It is a regulation of common carriers which the legislature has the power to impose, and it is certainly not so unjust and unreasonable that the courts should declare it void. See *Chicago & A. R. Co. v. People*, 105 Ill. 657, and *Illinois Cent. R. Co. v. People*, 148 Ill. 434, *ante*, where a similar law is held valid."

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO.

v.

B'SHEARS.

(59 *Arkansas*, 237.)

Enforcement of Statutory Requirement to Stop Trains—Tender of Expenses of Grading as Condition Precedent to Right to Mandamus.—Mansf. Dig. §§ 5500–5502 make it the duty of railroad companies to stop their trains within the corporate limits of towns upon the application of not less than 50 citizens thereof, but provide that before such stoppage can be compelled the town authorities must tender to the company the reasonable expense of grading a switch or side-track at the stopping place, and that if the company fails to comply with the request, *mandamus* may issue to compel the stoppage. *Held*, that a tender of the expenses is a condition precedent to the right to the *mandamus*.

BATTLE, J., and WOOD, J., dissenting.

APPEAL from Hempstead county circuit court.

STATEMENT BY THE COURT.

This is an appeal from a judgment of the circuit court of Hempstead county, granting a *mandamus* to compel the ap-

pellant to stop its fast train known as the "Cannon Ball" at the incorporated town of Fulton, upon the line of the road in said county.

The petition states that petitioner was the mayor of Fulton, an incorporated town in Hempstead county, Ark.; that defendant was an incorporated railway, and a common carrier of passengers and freight; that defendant's railway extended from Texarkana, through Fulton, to Little Rock, Ark.: that certain trains were operated on said railway, passing north and south through Fulton, known as the "Cannon-ball Trains;" that respondent had all the switches and side-tracks in said town of Fulton necessary for its use and convenience in the stopping of its trains, freight and passenger, and a commodious depot building for the use and comfort of its passengers; that respondent caused said cannon-ball trains to run rapidly through said town of Fulton without stopping, to the great annoyance and inconvenience of plaintiff and the other citizens of said town; that plaintiff and more than 50 citizens of said town of Fulton had applied in writing to Jay Gould, president, and to W. T. Kelley, superintendent, of defendant's corporation, and asked that said cannon-ball trains be stopped at said town of Fulton as provided for under the statute; that said application had been refused.

This petition was demurred to upon the following grounds:

1. Because it failed to set up facts sufficient to constitute a good cause of action against this defendant.

2. Because it failed to set up facts sufficient, under the statutes of the state of Arkansas, to entitle him to a writ of *mandamus* as prayed.

3. Because the plaintiff had no legal capacity to institute this suit.

4. Because there was no equity in the petition entitling plaintiff to the relief sought.

After argument, this demurrer was overruled and all proper exceptions duly saved.

The appellant answered, and, among other things, stated that two of its passenger trains and one local freight train, carrying passengers, going south, and the same number and kind of trains going north, stopped at the town of Fulton each day,—one passenger at 7:22 A.M., going south; one passenger at 7:55 P.M., going south; one passenger at 7:55 P.M., going north; one passenger at 3:32 P.M., going north. That the "Cannon Ball" going south passes Fulton at 12:45 P.M., and does not stop. That the Texas special passes Fulton at 3:01 P.M., and does not stop. That these trains run to and from St. Louis and Memphis. That the "Cannon Ball" was a fast train, carrying United States mail and passengers, and was

under the necessity of making fast time to make proper connection with trains at Texarkana and St. Louis; and that the granting of the petition would interfere with the rapid transportation of interstate passengers, and the rapid transfer and delivery of the United States mails. That said train stopped at all places where another road crossed or connected with appellant's road, etc.

After the evidence was concluded, the court declared the law to be as follows:

1. "That if at the time of the application of the plaintiff to defendant to stop the train mentioned in complaint at Fulton, Ark., the defendant had all the necessary switches and side-tracks at the town for the use and convenience in the stopping of the trains of the defendant, then it was not necessary to tender the reasonable expenses of grading a switch or side-track at said town, required by section 5501, Mansf. Dig., before the plaintiff would be entitled to insist upon the stopping of the trains prayed for.

2. That if the application required to be made under section 5500, Mansf. Dig., was made in writing to W. T. Kelly, superintendent of defendant's road from Poplar Bluff to Texarkana, while the president of the company and the general superintendent were non-residents, and absent from the state, that such application is sufficient, and a sufficient compliance with said section.

3. That under section 5500, Mansf. Dig., if the evidence shows that Fulton was an incorporated town in this state, situated on the line of defendant's road, and that 50 of its citizens made application to defendant, as required under said section, asking it to stop its trains which are mentioned in the complaint at such town, then it became the duty of the company to comply with the requirement of the statute, and stop the train.

4. That statute is not an interference with section 8, art. 1, of the constitution of the United States, which provides that congress shall have power to regulate the commerce among the several states. The legislature of the state may, in the exercise of its police power, pass any law, of a police character regulating the operation of railroad trains which it considers necessary to protect the comfort, convenience, and safety of its trains, notwithstanding such regulation may affect interstate trains. Upon the facts of this case, the court declares the law against the defendant, and *mandamus* is granted.

The defendant at the time objected separately to each of the declarations of law as made by the court, and also excepted to the finding of the court upon the facts in the case, and also

in rendering a judgment in favor of the plaintiff, and in granting said *mandamus*.

A motion for a new trial was then filed, overruled, exceptions saved, and an appeal prayed.

The following errors were assigned in the motion for a new trial :

1. Because the finding of the court was contrary to the law.
2. Because it was contrary to the evidence.
3. Because it was contrary to both the law and the evidence.

4. Because the court erred in refusing to declare the law as set out in prayers 1, 2, 3, 4, and 5, as asked by defendant.

5. Because the court erred in declaring the law to be as set out in prayers 1, 2, 3, and 4, as given by the court upon its own motion.

6. Because the court erred in declaring the law and facts in favor of plaintiff, and in granting the writ of *mandamus*.

7. Because the court has no jurisdiction to grant plaintiff's petition under the constitution and laws of the United States.

The petition for *mandamus* in this case was filed under sections 5500-5502, Mansf. Dig., which read as follows :

"Sec. 5500. When not less than fifty citizens of any incorporated town in the state, situated on the line of any railroad * * * shall make an application in writing to the president of said railroad, etc., * * * it shall be the duty of such railroad company to stop all its trains, freight or passenger, at some point within the corporate limits of such town most convenient, etc. * * *

"Sec. 5501. Before any town may or can insist upon, and compel the stoppage of trains as in this act provided, the corporate authorities of such town shall provide and make tender to such railroad companies, sufficient means to defray the reasonable expenses of grading a switch or side-track at such place of stopping for the use of such railroad company.

"Sec. 5502. The writ of *mandamus* may issue at the suit of any citizen of such town, upon the failure of any such railroad company to stop its trains as in this act provided, and to compel such company to comply with the requirements of this act."

The petition failed to state that the corporate authorities of the town of Fulton "had provided and had made tender to the defendant railway company, means sufficient to defray the reasonable expenses of grading a switch or side-track at such place of stopping for the use of" such defendant.

The circuit judge found as a fact "that at the time of the application of the plaintiff to defendant to stop the trains mentioned in the complaint at Fulton, Ark., the defendant had all

the necessary switches at the town for its use and convenience in the stopping of the train of defendant, and that, therefore it was not necessary for plaintiff or the town of Fulton to tender to the company sufficient means to defray the reasonable expense of grading a switch or side-track at said town, as required by section 5501, before the plaintiff would be entitled to insist upon the stopping of the trains prayed for." The issues upon the demurrer and upon the finding of facts by the court are the same, and may be considered together.

Dodge & Johnson, for appellant.

Scott & Jones, for appellee.

HUGHES, J. (after stating the facts).—The only question we have considered and determined in this case is whether this suit can be maintained, the citizens of Fulton having failed to provide and tender to the railway company means sufficient to defray the reasonable expenses of grading a switch or side-track at said town of Fulton for the use of said company, in accordance with the requirement of section 5501, Mausf. Dig. There does not appear to be any ambiguity or obscurity in this section of the statute. Where a statute is unambiguous, as a general rule but little room is left for construction.

In the case of *Sturges v. Crowninshield*, 4 Wheat. 202, it is said: "Although the spirit of the instrument, especially of the constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case for which the words of the instrument expressly provided shall be exempt from its operation. Where words conflict with each other, and would be inconsistent with each other unless the natural and common import of the words be varied, construction becomes necessary, and to depart from the obvious meaning of the words is justifiable. Yet in no case the plain meaning of a provision, not contradicted by any other provision in the same instrument is to be disregarded because we believe the framers of that instrument could not intend what they say. It must be one in which the obscurity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application." Quoted in *Suth. St. Const.* pp. 315, 316, § 238.

Mr. Sutherland says: "One who contends that a section of an act must not be read literally must be able to show one of two things,—either that there is some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general provision. The question for the

court is, what did the legislature really intend to direct? And this intention must be sought in the whole of the act, taken together, and other acts in *pari materia*. If the language be plain, unambiguous, and uncontrollable by other parts of the act, or other acts or laws upon the same subject, the court cannot give it a different meaning to subserve public policy or to maintain its constitutionality. The limited meaning of the word will be disregarded when it is obvious from the act itself that the use of the word was a clerical error, and that the legislature intended it in a different sense from its common meaning. Where that which is directed to be done is within the sphere of legislation, and the terms used clearly express the intent, all reasoning derived from the supposed inconvenience, or even absurdity, of the result, is out of place. It is not the province of the courts to supervise legislation, and keep it within the bounds of propriety and common sense." Sutherland on Statutory Construction, § 238.

Where the statute makes no exceptions the courts can make none. It might be very just and reasonable and right that the statute should make an exception, such as is contended it does make, or ought to be construed to make, but this was within the power of the legislature, "and its exercise of the power cannot be restrained or varied by the courts to subserve" convenience, to relieve from hardships or from requirements that seem unreasonable, or even absurd, where the language is plain and unambiguous. *Sims v. Cumby*, 53 Ark. 421, 14 S. W. 623; *McGaughey v. Brown*, 46 Ark. 37; *Railway Co. v. Lambert*, 42 Ark. 122; *Railway Co. v. Carley*, 39 Ark. 246.

The circuit court erred in awarding the *mandamus*, for the reason that no tender of amount necessary to pay expenses of grading switch had been made before suit, as required by the statute.

Reversed and dismissed.

BATTLE, J., dissenting.—I do not concur with the court in the interpretation of the statute in question. It requires railroad companies, on the application of 50 citizens of any incorporated town to the proper officer, "to stop all trains—freight or passenger—at some point within the corporate limits of such town most convenient for the reception and handling and discharge of freight, and the reception and discharge of passengers, and the reception and delivery of the mails, and most convenient to accommodate the business of such town;" and then adds: "Provided, that before any town may or can insist upon and compel the stoppage of trains, as in this act provided, the corporate authorities of such town shall provide and make tender to such rail-

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road companies sufficient means to defray the reasonable expenses of grading a switch or side-track at such place of stopping for the use of such railroad company." Acts 1873, pp. 169, 170. The object of this proviso was, I think, to relieve the railroad companies of any additional expense of grading a switch or side-track to the convenient place in the town where they are required to stop their trains. Before a town can compel the stoppage of trains it must tender sufficient means to defray the reasonable expenses of grading, not laying, a switch or side-track. If there is no grading to be done, no expense on that account can be incurred, and none, certainly, can be tendered or is required. The expense of laying or making the track which constitutes the switch, except grading, is imposed on the railroad companies.

In this case it is alleged, and not denied, that the railroad company has already constructed and in operation all the switches and side-tracks necessary for the stopping of trains. No grading is necessary for that purpose. It would be folly to require a tender of means to defray an expense which does not and will not exist, in the event the petition of appellee be granted.

WOOD, J., concurs with me.

Compelling Establishment of Depot in Suburb—Insufficiency of Business—Other Facilities.—In *Chicago & A. R. Co. v. People* (Ill., Oct. 22, 1894), 38 N. E. Rep. 562, it was held that where two municipalities adjoin, and one is substantially a suburb of the other, a railroad company operating its trains through both need not construct and maintain a depot in each, and hence where business at the suburb will not warrant the expense of maintaining a depot at such place, and the inhabitants there have access to the other municipality by a street-car line, and can reach the railroad at a station near the limits of the suburb, a *mandamus* will not issue to compel the establishment of a depot at such suburb. The court said: "In *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. 347, this court, speaking of the railway company, said: 'Nor is there any doubt of its duty to so operate its road as to afford adequate facilities for the transaction of such business as may be offered it, or at least reasonably be expected. This is equally true with respect to passengers and freight. As to the extent or sufficiency of these facilities, including the number and frequency of trains, that is to be judged of and governed chiefly by the amount of business on the line of the road. The company, however, is given, as it should be, a very large discretion in determining all questions relating to the equipment and operation of its road; hence courts, as a general rule, will not interfere with the management of railways in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted.' And in the same case it was further said: 'It is believed, however, no case can be found which, in the absence of statutory requirement, has gone to the length of holding that a railway company may be compelled, by *mandamus*, to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common-law authority

for making such an order.' When this case was here before (*People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857), we used this language: 'It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. Railway companies, though private corporations, are engaged in a business in which the public have an interest, and in which such companies are public servants, and amenable as such.' In the late case of *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643, we said: 'Railway stations, for the receipt and discharge of passengers and freight, are for the profit and convenience of both the company and the public. Their location at points most desirable for the convenience of travel and business is alike indispensable to the efficient operation of the road and the enjoyment of it as a highway by the public. Necessarily, therefore, the company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as practically to deny to communities on the line of the road reasonable access to its use.' In the case of *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369, it was held by the court of appeals of the state of New York that where a railroad company, by consolidation, becomes the owner of two lines of road between the same points, and can substantially accommodate the people of the state by operating one of them, and can abandon the other without serious detriment to any considerable number of people, it will not be compelled by *mandamus* to operate both, where the operation of the line thus abandoned entails great expense without any return. * * * We do not understand it to be a rule of the law that a railroad company that constructs its line of road through any portion whatever of the territorial limits of a town or village is absolutely required, under any and all circumstances, to establish and maintain a station and depot on its line within the limits of such town or village. Nor do we understand there is any invariable rule of law that when two municipalities adjoin, and one is substantially a suburb of the other, and a railway passes through a portion of each, there must necessarily be a station and depot in each."

Statutes Requiring Companies to Provide Waiting-rooms and Water-closets.—*Kentucky Statute—Effect of Amendment of July 5, 1893.*—In *Louisville & N. R. Co. v. Commonwealth* (Ky., April 9, 1895), 30 S. W. Rep. 616, it was held that the act of April 5, 1893, § 191, requiring railroads to provide convenient and suitable waiting-rooms and water-closets at all depots, etc., is not changed or modified by the amendment of July 5, 1893, wherein the word "privy" occurs, which has substantially the same meaning as water-closet, but that the object of the law as a whole is the comfort and convenience of those traveling upon or waiting to enter or leaving the respective trains run by the several railroads of the state.

Construction of Kentucky Statute—Necessity of Notice to Company to Comply with Act.—In *Louisville & N. R. Co. v. Commonwealth* (Ky., April 9, 1895), 30 S. W. Rep. 616, it was held that section 191 of the act of April 5, 1893, which requires notice by the railroad commissioners to railroad companies to rebuild or repair depots when they have become unfit for the accommodation of the public, has special application to a case where a depot has been destroyed by fire, or in the opinion of the commissioners has become unfit for the accommodation of the public; that the amendment of July 1, 1893, did not have the effect to make any substantial change in the act; and

that no notice is necessary before compelling the companies to comply with the requirements of the act respecting waiting-rooms and water-closets.

Sufficiency of Information Charging Violation of Statute Requiring Open Waiting-rooms.—In *State v. Cleveland, C., C. & St. L. R. Co.* (Ind., March 8, 1894), 36 N. E. Rep. 713, it was held that under a statute (2 Burns, Rev. St. 1894, §§ 5188, 5189) requiring railroad companies operating lines through cities and towns of 250 population or more to provide and maintain suitable waiting-rooms for the convenience of the traveling public, and to keep such rooms open for a period of not less than one hour next preceding the arrival of all passenger trains required by schedule to stop at such station, and providing that a failure to comply with such provisions shall be punishable by fine, an information which charges a failure to keep open waiting-rooms for the convenience of the traveling public for the time prescribed by statute is insufficient if it fails to show that the company had waiting-rooms. *Citing* *Schmidt v. State*, 78 Ind. 41; and also *citing*, as to the necessity that the statute should be strictly construed, *Vanhook v. State*, 5 Blackf. 450; *Steel v. State*, 26 Ind. 82; *Klingensmith v. Kepler*, 41 Ind. 341; *Telegraph Co. v. Steele*, 108 Ind. 163; and as to the necessity of certainty in the charge made, *Keller v. State*, 51 Ind. 415; *Shaffer v. State*, 82 Ind. 221; *Smith v. State*, 125 Ind. 440; *Nichols v. State*, 127 Ind. 406; *Littell v. State*, 133 Ind. 577.

Laying out Highway over Depot Grounds under Michigan Statute—Burden on Company to Show non-feasibility of Plan.—In *Battle Creek & S. R. Co. v. Tiffany*, 99 Mich. 471, it was held that in order to defeat the right given by How. Stat., ch. 29, which confers power upon a commissioner of highways, to lay out a highway across village depot grounds, except where the concurrent use of the land will be impossible, or attended by serious inconvenience to the railroad company, the latter must clearly prove its intention to so use the land as to show its good faith, and the incompatibility of the two uses. *Citing* *Railroad Co. v. Drummond*, 46 N. J. L. 644; *Philadelphia R. Co. v. City of Philadelphia*, 9 Phila. 563.

When Action of Highway Commissioner in Laying out Highway will be Reviewed.—In *Battle Creek & S. R. Co. v. Tiffany*, 99 Mich. 471, it was held that where a railroad company in good faith files its bill to restrain a highway commissioner from opening a highway, laid out by him across depot grounds and along a way, and it appears that the company was allowed \$100 for damages, and that it has no just reason to oppose the laying out of the highway, the proceedings of the commissioner will not be reviewed.

Personal Injuries Sustained on Depot Grounds—Sufficiency of Declaration—Setting out Invitation or Allurement on Grounds.—In *O'Neil v. Duluth S. S. & A. R. Co.* (Mich., July 10, 1894), 59 N. W. Rep. 836, which was an action to recover for personal injuries sustained by stumbling over a rail near a station, the declaration set forth that defendant possessed and controlled a public railroad station, and at said station the main and side tracks in question, "across which said side tracks and main track, at the point where said plaintiff was injured, * * * all persons lawfully being at said station, and having occasion to go thence to the principal business portion of the village of Seney, or therefrom to said station, were used and accustomed, and were authorized by the defendant, to pass and repass." It then alleged the duty of planking between and alongside of the rails, and the negligent omission thereof. It stated further that on the evening of December 17, 1891, the plaintiff was expecting to receive a letter or letters which he supposed had been directed to him at Marquette, and for which he had telegraphed a request that they be sent to him at Seney by the conductor of a train upon said railroad, to receive which letter or letters the defendant had authorized plaintiff to go and pass and repass across, over, and upon its said tracks at the point aforesaid, to wit,

opposite and in front of a certain drug-store kept by one Scott, the same being a regular, usual, and accustomed way for him to go and pass and repass for this purpose, of which fact defendant had notice, and whereas said plaintiff was intending, in case he received no letters, to go to the telegraph-office, which was in the station or depot building of said defendant, for which purpose, likewise, said defendant had as aforesaid authorized him to cross said tracks at said point, there being no regular and accustomed place for crossing for such purposes. The plaintiff, while on his way aforesaid to the train at said station, and, in case he received no letters, then to said telegraph-office, "and while lawfully upon the premises of said defendant, with its premission and by its invitation," etc., "did stumble and fall over one of the rails," etc., and it was held that the declaration failed to state a cause of action in not unequivocally setting out an invitation to the plaintiff or his allurement upon the portion of the grounds where the injury occurred. *Citing Sturgis v. Railway Co.*, 72 Mich. 622.

Duty and Liability of Company to Person Unloading Freight Cars on Spur Track, and Sustaining Injury by Cars of Unusual Width Striking Movable Platform Used by Him.—In *McCabe v. Chicago, St. P., M. & O. R. Co.*, 88 Wis. 531, it appeared that the foreman of a gang of laborers engaged in unloading material from freight cars on a spur track was injured by the falling of a movable platform which had been constructed by his employers for use in the work, and which at the time was standing so near the track that it was struck and knocked down by cars of more than ordinary width which were being pushed in upon that track in the customary course of the business of the railroad company, and it was held that the foreman was a mere licensee to whom the company owed no duty of active care, and that no liability attached to it for the injury. The court said: "The plaintiff was a mere licensee. The defendant owed him no duty of active care. The plaintiff himself was bound to the exercise of the highest care to shield himself from injury. He had no reason to expect that the defendant would regulate the running of its trains, or change the course of its business, to suit his purposes or convenience. He could expect from it only such consideration and ordinary care as it owes to the general public. *Cahill v. Layton*, 57 Wis. 600, 16 N. W. 1; *Hogan v. Railroad Co.*, 59 Wis. 139, 17 N. W. 632; *Truax v. Railway Co.*, 83 Wis. 547, 53 N. W. 842; *Wood on Railroads*, 1469; and cases cited. *Butler Bros.* [the employers] took the permission to use the defendant's right of way, in the manner in which they were using it, subject to the ordinary risk and danger which was incident to the use of the spur track by the defendant in the manner in which it was accustomed to use it. There was no implied promise on the part of the defendant to cease doing any part of its customary business in the customary manner, or that it would desist from any customary service to any of its patrons along that track. The evidence fails to show that anything was done by the defendant out of the customary course of its business along that track."

LINDSEY

v.

MAYOR & COMMON COUNCIL OF ANNISTON.

(Alabama Supreme Court, August 10, 1894.)

Validity of Ordinance Prohibiting Hackmen from Entering Depot Grounds—Exercise of Powers Conferred by Charter.—An ordinance prohibiting hackmen, agents of transfer companies, and others from going within a depot on the arrival and departure of trains for the purpose of soliciting patronage is a valid exercise of the power conferred by a charter authorizing the municipal authorities to regulate hacks, carriages, and other vehicles.

Effect of Ordinance on Rights Conferred by Railroad Company Prior to its Passage.—A grant by railroad companies to a transfer company of an exclusive right by the agents and employes of the latter to enter the premises and trains of the former for the purpose of soliciting patronage, although made before the passage of the ordinance, and founded upon a valuable consideration, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to regulate the business and employment of hackmen, and consequently the ordinance is as well applicable to the transfer company as to others engaged in a like business.

APPEAL from Anniston city court.

The appellant was arrested, and tried before the recorder of the city of Anniston, for the violation of an ordinance of the city. On his appeal to the city court of Anniston, there was a complaint filed in behalf of the mayor and city council of Anniston, claiming of the defendant a penalty for the violation of an ordinance passed by the mayor and city council of Anniston "to prevent the annoyance to persons arriving or departing on passenger trains at the union depot in the city of Anniston," in that the said Lindsey, "being a hackman, or the agent of a transfer company, at the arrival of a passenger train at the union depot, in the city of Anniston, did go within the said depot for the purpose of soliciting patronage for his hack or transfer company," and that said Lindsey failed to stand without the entrance, leaving the passageway clear at said entrance.

The cause was submitted to the court upon an agreed statement of facts, of which the following is a copy:

"It is agreed between the parties that the facts of this case are as follows: That on the 18th day of March, 1891, Joe Lindsey, employé and transfer man, and agent of the Anniston Transfer Company, in the discharge of his duties, at the

time of the arrival of a passenger train, was at and within the union depot at Anniston, Alabama, soliciting in an orderly and respectful manner, without hindrance to the travelling public, passengers and baggage for said company, under authority from said company as its agent, said company claiming the right for its agents to so solicit passengers and baggage under and by virtue of a contract and bond submitted as part of the evidence in this case, which bond and contract are objected to as evidence on the ground that it is irrelevant and no defense to a violation of the ordinance. That the said union depot is, and at the time was, the property of the Alabama Mineral Railroad Company, under the sole control and management of said railroad company and the East Tennessee, Virginia & Georgia Railroad Company as a passenger depot."

The plaintiff also introduced in evidence a copy of the ordinance referred to, entitled "An ordinance to prevent the annoyance of persons arriving or departing on passenger trains at the union depot in the city of Anniston." The first section of this ordinance is as follows: "Be it ordained by the mayor and city council of Anniston that at the arrival and departure of passenger trains from the union depot, no hackman, agent of any transfer company, livery stable, hotel porter, or any other person shall go within the depot for the purpose of soliciting patronage for his hack, transfer company, livery stable, hotel, or baggage or transfer wagon; but all such persons shall stand without the entrance leaving a clear passageway at such entrance."

The cause was submitted to the court without the intervention of a jury.

Judgment was rendered in favor of the plaintiff, assessing the fine at the same amount which was imposed by the recorder.

Knox, Bowie & Pelham, for appellant.

Benj. Micou, for appellee.

BRICKELL, C.J.—The amended charter of the city of Anniston confers on the mayor and council of the city large powers intended to promote good government within the corporate limits, and the public peace, order, and convenience. Among other powers, is the power "to license, tax, and regulate hacks, carriages, drays, and all other vehicles, and to fix the rate to be charged for the carriage of persons and property within the corporate limits of the city, or to the public grounds or property without the city." Pamph. Acts 1890-91, p. 104.

The ordinance the appellant was convicted of having violated was adopted by the mayor and common council in the

exercise of the power to regulate hacks. The power of regulation is the more general of the powers the charter confers, and, as applied to business, occupations, or employments, is the power to prescribe rules for the conduct of the business, or the manner in which the occupation or employment should be pursued. Hackmen, cartmen, and wagoners, engaged in the carriage of goods or persons for hire, by the common law are regarded as common carriers, and the power lies in the legislature, in the absence of constitutional restraint or limitation to regulate, to prescribe the rules according to which their business may be conducted. *Munn v. Illinois*, 94 U. S. 113.

The power may be, and is often, delegated to municipal corporations, to be exercised for the promotion of the public convenience. When the power has been delegated in terms of the character employed in the amended charter, the validity of ordinances prescribing the times, places, and manner in which the employment is to be pursued, has been uniformly sustained. *Com. v. Stodder*, 2 Cush. 562; *City of St. Paul v. Smith*, 27 Minn. 364, 7 N. W. 734; *Veneman v. Jones*, 118 Ind. 41, 20 N. E. 644.

Such ordinances are in their nature and essence police laws or regulations, and, when adopted in the exercise of an express legislative grant of power, there can be no inquiry into or discussion of their policy or reasonableness. "What the legislature says may be done cannot be set aside by the courts because they may deem it unreasonable or against sound policy." 1 Dill. Mun. Corp. § 328.

The material contention of the appellant is that, if he be subjected to the operation of the ordinance, his principal, the Anniston Transfer Company, in whose service he was engaged when doing the act complained of, will be divested of a right and privilege which the railroad companies owning and constructing the depot had granted, on a valuable consideration, prior to the adoption of the ordinance.

The contract into which the railroad companies and the transfer company had entered purports to be founded on a valuable consideration, and thereby the railroad companies do, "so far as it is lawful," grant to the transfer company the exclusive right, by the officers, agents, and employés, to enter the premises and trains of the grantors for the purpose of soliciting patronage.

It is forcibly argued by the counsel for the appellee that the real object of the contract—the object the parties contemplated and proposed to accomplish—was the grant to the transfer company of the exclusive right and privilege to enter

the premises and trains of the railroad companies for the solicitation and procurement of the patronage of passengers, and that of consequence the contract is illegal, offending public policy.

It is a grave and important question, embarrassed by a serious conflict of authority, whether a railroad company may grant to hackmen, or to others pursuing a public employment, the exclusive right to enter its depot, or to enter and occupy the adjacent grounds, for the purpose of soliciting and obtaining patronage. The authorities have been carefully collected, reviewed, and discussed by Mr. Freeman in the elaborate notes to the case of *Bus Co. v. Sootsma* (Mich.), 47 N. W. 667, and *Railroad Co. v. Langlois* (Mont.), 24 Pac. 209. The necessities of this case do not require a discussion or decision of that question. The contract, whatever may be its objects, or whatever may be the rights it confers, or it was intended to confer, must be deemed to have been entered into in view of and in subordination to the powers of the municipal authorities to exercise the power to regulate the business and employment of hackmen. *Knoxville Corp. v. Bird*, 12 Lea, 121.

It is observed by Judge COOLEY that the clause of the constitution of the United States forbidding state legislation impairing the obligation of contracts "does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." Cooley, *Const. Lim.* (6th Ed.), 707.

The charter of the city is essentially a public statute; of it all the courts of the state take judicial notice; and obedience to it is due from all who are within its protection. It is not mere legal presumption, resting upon considerations of public policy, that the law silently incorporates itself into the contracts of parties. The incorporation, when the parties are dealing in good faith, most often comports with their actual intention, or they would have expressed all that the law may imply. The parties could not have contemplated that the municipal authorities would never exercise the power with which they were clothed to regulate the business of hackmen, nor is it to be presumed that they intended any embarrass-

ment or diminution of the power when exercised. The juster presumption is that it was not intended the rights and privileges the contract may confer should endure if they became in conflict with the regulations ordained by the municipal authorities.

However this may be, the ordinance is a valid exercise of the power with which the municipal authorities were clothed; a power intended for the protection of the public and the promotion of good order, and its exercise deemed necessary for the public benefit. If thereby pre-existing private rights are restrained or limited, the restraint or limitation is *damnum absque injuria*. 1 Dill. Mun. Corp. § 141; *Vanderbilt v. Adams*, 7 Cow. 349. The individual shares in the public benefit which it is intended to promote, and this is the compensation deemed by the law adequate.

The act the appellant admitted was a violation of the ordinance, necessitating the judgment of conviction, and it must be affirmed.

Control of Depot Ground by Railroad Company—Regulation as to Hackmen.—See *Cole v. Rowen* (Mich.), 50 Am. & Eng. R. Cas. 1, and note, 4. See also a review on the English and American cases in note, 38 Am. & Eng. R. Cas. 496.

Union Depot Companies.—See *Union Depot Co. v. Chicago, Kansas & Nebraska R. Co.* (Mo.), 56 Am. & Eng. R. Cas. 45, and note, 254.

Right to Restrain Encroachment on Grounds of Union Depot Company by Hotel Runners and Others.—In *Pittsburgh, Ft. W. & C. R. Co. v. Cheevers* (Ill., March 31, 1894), 37 N. E. Rep. 49, it was held that an injunction would not be granted at the instance of railroad companies to restrain and prevent encroachments upon their rights as abutting owners and occupiers of a union passenger station and grounds, by solicitors, hotel-runners, drivers of vehicles, and persons not in the employ of the companies, where by the testimony it appeared that the only detriment to the complainants from the manner in which hotel-runners, expressmen, and others, conducted their business, was through annoyance caused to passengers entering and departing from the depot. The court said: "I conclude as a matter of law, that such annoyance and indirect injury does not constitute such a nuisance as a court of equity will enjoin, but that, in order to lay the basis for equitable relief, it is necessary to show that the complainant is injured in its property rights by the obstruction or interference with its easement and right to an uninterrupted use of the public street in front of its premises; and such detriment and annoyance as it suffers in common with the public, and which is only indirect, must be left to the public authorities to regulate and control, and cannot be remedied by a court of equity on the application of one, as a member of the public, even though he may suffer more than the majority of others from the existence."

STATE *v.* HOSKINS.Same *v.* SMITH.*(Minnesota Supreme Court, June 28, 1894.)*

Constitutionality of Statute Requiring Protection from the Weather of Persons in Control of Electric, Cable, and Steam Cars—Exercise of Police Power.—Laws of 1893, ch. 63, requiring street-railway companies operating electric, cable, or steam cars to protect their employes from exposure to the inclemency of the weather is within the police power of the state, and therefore constitutional.

Same—Class Legislation.—Such an act is not class legislation, because it does not include street-cars drawn by mules and horses, or carriages and wagons, for the reason that the closing in of persons operating vehicles specified in the act does not impair their control of such vehicle as it would in vehicles drawn by mules and horses by separating the driver from his animals.

Same—Impairment of Obligation of Contracts.—Whenever parties contract on matters within the police power of the state they do so subject to the exercise of that power by the legislature.

Same—Excessive Penalties.—The imposition by the act of a fine of not less than \$50 nor more than \$100 for its violation, and making each day that the cars may be operated without compliance with the law a separate offense, and so adding up a large aggregate of fines, does not make the punishment excessive.

APPEAL from St. Paul municipal court and from Minneapolis municipal court.

Munn, Boyeson & Thygeson, for appellant Hoskins.

Koon, Whelan & Bennett, for appellant Smith.

H. W. Childs, Atty.-Gen., Frank M. Nye, and Pierce Butler, Co. Attys., for the state.

GILFILLAN, C.J.—In these two cases the validity of laws 1893, c. 63, entitled “An act to compel street-railway companies to protect certain of their employes from the inclemency of the weather,” is called in question. That act requires of street-railway companies operating electric, cable, or steam cars, requiring the constant service of persons on any part of the cars except the rear platform, to provide each car with an inclosure, constructed of wood, iron, and glass, or similar suitable material, sufficient to protect such employes from exposure to the inclemency of the weather, but not so as to obstruct the vision of the person operating the

Case stated.

car, at all times between November 1st and April 1st in each year. What are called "trailing-cars" are excluded from this requirement, so that it applies only to cars on which the motive power is operated or controlled. The law was passed with reference to the fact that the man operating or controlling the motive power of such cars was required to stand where his person was almost wholly exposed to cold, storm, and wind, having but little protection except such as the clothing affords. The act is assailed as unconstitutional, on the grounds, first, that it is not an exercise of the police power of the state; second, it is class legislation; third, it impairs the obligation of a contract; fourth, it interferes with the liberty of contract between street-railway companies and their employes; fifth, it imposes an excessive fine.

It is stipulated as a fact, what everybody knows, that electric cars are run at a rate of speed of from four to fifteen miles an hour, and at an average rate of between eight and nine miles an hour. Any one acquainted with the extreme cold of

Police power. much of the weather in this climate between the first of November and the first of April, and who knows, as everybody does, that the motorman on an electric car is obliged to stand in one place, always on the alert, his whole attention given to the means of controlling the motive power and the brake, and to looking out ahead and unable, with due regard to his duties, to give attention to protecting himself from the cold, must appreciate that, when going at the rate of eight or nine miles an hour, perhaps against a head wind, and with the mercury below zero, the position of the motorman is one not merely of discomfort, but of actual danger to health, and sometimes to life, and the tendency of which is to disable him to some extent to perform his duties in the way that care to safety of his passengers and of travelers on the streets requires. It has never been questioned that the police power of the state extends to regulating the use of dangerous machinery, with a view to protecting, not only others, but those who are employed to use it; and if it be conceded, as it must be, that the state may intervene, by regulations in such a case, we do not see why it may not in such a case as this.

The act is within the police power. When a subject is within that power the extent to which it shall be exercised and the regulations to effect the desired end are generally wholly in the discretion of the legislature. The legislature might in this case have required the use of the prescribed inclosure only at such times when the cold reached a certain degree, or when storms prevailed, but it was thought fit to make sure of the result aimed at by covering the time of year when ex-

treme cold and bitter storms may occur at any time, and that was within its exclusive province.

The objection that this is class legislation is based on the fact that the act is confined to street-cars propelled by cable, steam, or electricity, and does not include street-cars drawn by mules and horses or carriages or wagons, and it is assumed that here is an attempt at purely arbitrary classification for the purpose of the act. The evil sought to be remedied does not exist in case of the slowly-going mule or horse car, or carriage or wagon, to the same degree as in the case of cable, electric, or steam cars. But where an evil exists in a variety of cases it is a sufficient ground for classification in legislating so as to include some and exclude others, that in the former the evil can be remedied, while in the latter it cannot be. The man in control of the cable, electric, or steam railway car may be boxed in without impairing his power of control in the slightest degree; but to box in the driver of a horse or mule car, or of a stage-coach or carriage or wagon, separating him from his animals, while of course it could be done, would bring about greater evils than those sought to be remedied. The difference in this respect between cars included in this act and those not included is such as to justify difference in legislating.

Class legisla-
tion.

The claim that the act impairs the obligation of a contract is based on the fact that in each case the railway company had a contract with the city, made before the passage of the act, in which the former bound itself to run cars "of the best modern style and construction," and this act requires something in addition thereto. We need only say of that, where parties contract on matters within the police power of the state they do so subject to the exercise of that power whenever the legislature chooses to exercise it. If one contract with the state or a municipal corporation, acting under authority of the state, even if it were conceded that the legislature can, by contract or by giving authority to make a contract, bind the state not to exercise the police power, the legislative intent to do so would have to appear unmistakably. There is nothing to suggest such intent in the charter of either city.

Impairment
of obligation
of contract.

What we have said on the third point made by appellants applies with equal force to the fourth.

The act imposes a fine of not less than \$50 nor more than \$100 for a violation of the law, and makes each day that cars shall be run without complying with the law a separate offense. A fine of from \$50 to \$100 could not be called excessive. It is true the party may, by repeatedly committing the offense, add up a large aggregate of

Excessive
penalties.

finer; so might the offender against any other law—the law against larceny or embezzlement or any other—but that would not make the punishment excessive. Judgment affirmed.

COLLINS and BUCK, J.J., took no part in the decision.

PITTSBURGH, CINCINNATI & ST. LOUIS R. CO.

v.

BALTIMORE & OHIO R. CO. *et al.*

(*U. S. Circuit Court of Appeals, 6th Circuit, May 8, 1894. 61 Fed. Rep. 705.*)

Jurisdiction of Federal Court—Diverse Citizenship—Identity of Interests.—An agreement between two railroad companies for the joint operation of a line of road, provided that local freight business between certain points should be transacted by one company, and that both corporations should share in the proceeds thereof in specified proportions. *Held*, in an action by the lessee of one company, which, by reason of diverse citizenship could have maintained the action had it alone been interested, against the lessor company, and the successor in interest of the other contracting company and other railroad companies, all of which were citizens of the state, that the federal court had no jurisdiction, for the reason that the interests of the lessor company being identical with those of complainant the controversy was not between citizens of different states.

Appealability of Decree Determining Right to Account and Settling Principles for Taking.—A decree determining the right of complainant to an account, and settling the principles upon which the account should be taken is an interlocutory decree from which no appeal lies. *Following Perkins v. Fourniquet, 6 How. U. S. 206.*

APPEAL from the circuit court of the United States for the southern district of Ohio.

The Baltimore & Ohio Railroad Company, a corporation of the state of Maryland, filed its bill in the circuit court of the United States for the southern district of Ohio, September 30, 1886. The defendants thereto are the Pittsburgh, Cincinnati & St. Louis Railway Company and the Central Ohio Railroad Company, as reorganized, both being corporations of the state of Ohio. The object of the bill was to have an ac-

Case stated.

counting as to the receipts from local freights earned on that part of the line jointly owned and operated between Newark and Columbus, Ohio, and known as the Newark & Columbus Division of each road. That division was originally owned by the Central Ohio Railroad Company, which company became insolvent, and was placed in the

hands of a receiver. While thus in a receiver's hands, it, under a statute of Ohio, and with the approval of the court conducting the receivership, sold an undivided one-half interest in so much of its line as lay between Columbus and Newark to the Steubenville & Indiana Railroad company. After this sale the presidents of the two companies entered into a written agreement as to the joint operation of the division so jointly owned. Subsequently the Central Ohio Railroad company was reorganized under the laws of Ohio, under the name and style of the Central Ohio Railroad company, as reorganized. Under the statute permitting this reorganization, the new company succeeded to all the property rights and contracts of the old company. In 1886 the Baltimore & Ohio Railroad company, being the complainant corporation, leased the line of the Central Ohio Railroad company, as reorganized, and succeeded to all its rights and liabilities. In 1868 the Steubenville & Indiana Railroad Company was consolidated with two other lines of road under the name and style of the Pittsburgh, Cincinnati & St. Louis Railway Company, being the defendant corporation herein. Under the law of Ohio, it likewise succeeded to all the rights, property, and contracts of its several constituent roads. These two companies, the Pittsburgh, Cincinnati & St. Louis and the Baltimore & Ohio, have, since the 11th of May, 1868, the date of the creation of the Pittsburgh Company, been jointly operating, maintaining and managing the said Columbus & Newark Division of said road.

The contention of complainant in this litigation is that a certain contract entered into between the Central Ohio Railroad Company and the Steubenville & Indiana Railroad Company, in 1865, and immediately after the sale of the one-half interest in the Columbus & Newark Division to the latter company, is still in force as originally executed. That contract and its amendments are very lengthy, and cover every possible question involved in a joint ownership and operation of a railroad. This controversy turns wholly upon clauses 13 and 15 of said contract, which are in these words: "Thirteenth. The local-freight business from and to Newark and Columbus, with stations on the line of said road between those points, to be done by the Central Ohio Railroad Company." "Fifteenth. The general freight agent of the Central Ohio Railroad Company shall keep an account of the earnings arising from the local business mentioned in item thirteen, and at the end of each month shall furnish said superintendent and the general freight agent of the Steubenville & Indiana Railroad Company each with a duplicate thereof; and that for such service the Central Ohio Company shall receive sixty-

five per centum thereof, and the remainder shall be divided between said companies equally."

The bill charges that the complainant company and the Pittsburgh, Cincinnati & St. Louis Railway Company both recognized the validity and binding obligation of the said contract, and continued to act thereunder until the month of June, 1872, "when the said defendant entered upon and commenced the business of carrying local freights between said cities and the stations on the said Columbus & Newark Division, and has continued to do so ever since, notwithstanding your orator has repeatedly objected to the said defendant engaging in such business, and has insisted that it, as the lessee of the Central Ohio Railroad Company, as reorganized, was entitled to carry all of the local freight thereon. And your orator has repeatedly offered to state an account with the said defendant, and render and deliver to it a statement of the local freights which it has during the term aforesaid carried, but the said defendant has repeatedly and persistently refused to recognize the right of your orator to have such accounting made, and has insisted that it has the right to engage in the business of carrying local freight as aforesaid; and neither the general freight agent of your orator nor of the said Central Ohio Railroad Company, as reorganized, has been able to keep an account of the earnings arising from the business as hereinbefore stated, by reason of the refusal of the defendant to furnish the accounts as aforesaid."

With regard to the Central Ohio Railroad company, as reorganized, the allegations of the bill are that, by the terms of the lease to the Baltimore & Ohio Railroad Company, the said Central Ohio Railroad Company, as reorganized, was entitled to receive 35 per cent of the gross earnings of the said the Central Ohio Railroad Company, including the Columbus & Newark Division thereof, "and including the proper proportion of the earnings of the said Columbus & Newark Division under said contract with reference to the local freights and local passengers."

The prayer of the bill was that the total amount of local freights provided for in articles 13 and 15 of the alleged contract shall be "ascertained, and the amount which is due to your orator determined, as well as that which is due to the Pittsburgh, Cincinnati & St. Louis Railway Company, and to the defendant the Central Ohio Railroad Company, as reorganized, as the lessor of your orator." It prays that an account be taken under the order and direction of the court with reference to the local freights so as aforesaid carried, "and that your orator be allowed eighty-two and one-half per cent of the total amount of freight carried by both of said

parties, and that the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company, be allowed seventeen and one-half per cent of the total amount thereof, and that thirty-five per cent of the amount allowed to your orator be awarded or be paid as rental to said defendant herein, the Central Ohio Railroad Company, as reorganized, and that upon the taking of said account the amount which is found due to either of said parties defendant, or your orator, be directed to be paid within the time to be specified by the court."

The Central Ohio Railroad Company answered, its answer being styled a cross-petition. In this pleading it is set up that, at the time of the lease to the complainant, the contract between the Central Ohio Railroad Company and the Steubenville & Indiana Railroad Company was in full force, and that the complainant became the lessee of the said railway property subject to the terms of said contract, and that the complainant had no authority or power to make any change in said contract, "and that, if said contract was changed or to be changed, it could be done only by the Central Ohio Railway Company, by and through its president, properly authorized." It further set up that by reason of said contract and lease it was entitled to receive as rental 35 per cent of the entire earnings of the said Columbus & Newark Division in carrying local freights thereon, less 17½ per cent, which, under said contract, was to be paid to the said Steubenville & Indiana Railroad Company, or its successor, the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railway Company. It was further stated that since June, 1872, the defendant had received 35 per cent of the local freights carried on said division by the plaintiff company, but had received no part of the earnings for local freight by reason of freight carried by said defendant, the Pittsburgh, Cincinnati & St. Louis Railway Company; and it says that it is entitled to receive now from the plaintiff 35 per cent of the local freights carried by said Pittsburgh, Cincinnati & St. Louis Railway Company since June 18, 1872, and it asks that the said plaintiff be required to account to it for the same. It denies all knowledge that the Pittsburgh, Cincinnati & St. Louis Railway Company was engaged in the business of carrying local freight, and was not accounting to the complainant therefor, and that this defendant was receiving no part thereof, and avers that these facts only came to its knowledge in the past two or three years, and that it had in no manner assented or agreed with said Pittsburgh, Cincinnati & St. Louis Railway Company that it should engage in the business of carrying local freights, and in this manner

impair the usefulness of said division to said defendant, and deprive it of the revenues that belong to it, and of which it is the exclusive owner, under its charter, as set out in complainant's bill of complaint.

This cross-petition was answered only by the Pittsburgh, Cincinnati & St. Louis Railway Company, which denied all liability to the Central Ohio Railroad Company, or its lessee, the Baltimore & Ohio Railroad Company, and claimed that the said agreement as to the doing of the local-freight business on the said Columbus and Newark Division had been abrogated June, 1872, and had never since been in force. No answer was filed by the Baltimore & Ohio Company, with whom an accounting was asked.

An accounting was ordered, and upon the final hearing the circuit court decreed that there was due from the Pittsburgh, Cincinnati & St. Louis Railway Company to the complainant the sum of \$2748.31, with interest; and to the respondent the Central Ohio Railroad Company, as reorganized, the sum of \$10,341.40, with interest. From this decree the Pittsburgh, Cincinnati & St. Louis Railway Company has appealed and assigned errors.

Harrison, Olds & Henderson, for appellant.

J. H. Collins, for appellees.

LURTON, Circuit Judge (after the foregoing statement).—A preliminary question is made by the Baltimore and Ohio Railroad Company. It insists that the decree appealed from was not the final decree; that a final decree was pronounced June, 1890, and a supplemental decree June, 1893; that the appeal was from this last decree, and that the questions settled by the former decree of June, 1890, cannot be reviewed, because there was no appeal from it within the time allowed by law. The decree of June, 1890, was purely interlocutory. The cause was then heard upon the pleadings and proof, and the principles upon which the account should be taken determined, and a reference made to a master to take and state an account upon the basis therein directed. Upon the coming in of the account so ordered, exceptions were filed. These were then considered by the court. Some were sustained, others overruled. The account was restated in accordance with these rulings, and a final decree pronounced, from which a broad appeal was prayed and granted. This appeal opens up the whole case.

A decree determining the right of a complainant to an account and settling the principles upon which the account should be taken, is an interlocutory decree, from which no appeal lies. A decree of like character was appealed from in

Perkins v. Fourniquet, 6 How. 206. The appeal was dismissed as premature. The opinion was by TANEY, C.J., who said: "This clearly is not a final decree in any respect. It is the common and ordinary interlocutory order or decree passed by courts of chancery in cases of this kind, and is absolutely necessary to prepare the case for a final hearing and final decree, wherever the complainant is entitled to a partition of property or an account. For the principles upon which an account is to be stated by the master, or a partition made, cannot be prescribed by the court until it first determines the rights of the parties by an interlocutory order or decree; and the case cannot proceed to final hearing without it. And the appellant is not injured by denying him an appeal in this stage of the proceedings, because these interlocutory orders and decrees remain under the control of the circuit court, and subject to their revision, until the master's report comes in and is finally acted upon by the court, and the whole of the matters in controversy between the parties disposed of by a final decree. And, upon an appeal from that decree, every matter in dispute will be open to the parties in this court, and may all be heard and decided at the same time."

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Upon the coming in of the account so ordered, it was entirely in the power of the circuit court to change its opinion from that expressed in the interlocutory opinion, and dismiss the bill. This question was expressly decided on a second appeal in the case of *Perkins v. Fourniquet*, above cited. See, also, *Fourniquet v. Perkins*, 16 How. 82.

Another preliminary question remains to be decided before the merits of the case can be considered. Did the circuit court have jurisdiction of the controversy arising on the pleadings? Is the real controversy wholly between the complainant on one side and the two defendant corporations on the opposite side? The complainant corporation is a citizen of the state of Maryland. The two defendant corporations are citizens of the state of Ohio. Was the Central Railroad Company, as reorganized, either a proper or necessary party? The final decree would seem to indicate that the interest of the Baltimore & Ohio Company and those of the Central Company were common interests,—that the rights of each depended upon the same questions. In determining a question of jurisdiction, where it depends upon citizenship, it is unimportant that the pleader has put a particular party upon the one or the other side of the case. Jurisdiction in such cases depends, not upon an arbitrary arrangement of the parties made by the pleader, but upon their arrangement according to interest. If, when arranged by inter-

Jurisdiction.

est in the litigated question, all on one side are citizens of a state other than that of those on the other side, then jurisdiction exists. Removal Cases, 100 U. S. 457.

In Railroad Co. v. Ketchum, 101 U. S. 289, the construction placed on the second section of the act of March 3, 1875, in regard to the removal of causes, was declared to be applicable to the first section concerning suits originally brought in the courts of the United States. In that case the court said: "The same general language is used in the second section of the same act in respect to the removal of suits from state courts, and in Removal Cases, 100 U. S. 457, we held it to mean that, when the controversy about which the suit was brought was between citizens of different states, the courts of the United States might take jurisdiction without regard to the position the parties occupied in pleadings as plaintiffs or defendants. For the purpose of jurisdiction the court had power to ascertain the real matter in dispute, and arrange the parties on one side or the other of that dispute. If in such arrangement it appeared that those on one side were all citizens of different states from those on the other, jurisdiction might be entertained and the cause proceeded with. That ruling, we think, applies as well to the first section as to the second."

What is the matter in dispute? The questions all arise out of a contract originally between the Central Ohio Railroad Company on the one side, and the Steubenville & Indiana Railroad Company on the other. The bill shows that the defendant the Pittsburgh, Cincinnati & St. Louis Railway Company has succeeded to all the property interests and contract rights of the latter company. It sets out that: "Under the terms of the lease executed by the said the Central Ohio Company, as reorganized, it took possession of the said Central Ohio Railroad, and the said Columbus and Newark Division thereof, subject to the terms of the said contract, * * * and was entitled to all the privileges and subject to all of the terms thereof, the same as its lessor had previously been."

It further alleged that: "By the terms of the said lease, the said Central Ohio Railroad Company, as reorganized, was entitled to receive 35 per cent of the gross earnings of the said the Central Ohio Railroad, including the Columbus and Newark Division thereof, and including a proper proportion of the earnings of the said Columbus and Newark Division under said contract with reference to the local freight and local passengers."

It then states that the obligations of the said contract had been recognized by complainant and by the defendant the Pittsburgh, Cincinnati & St. Louis Railroad Company, and acted

under until June, 1872, when the said defendant commenced the business of carrying local freight, contrary to said agreement, and has continued to do so ever since, notwithstanding objections and protests by complainant, and that it has refused to account for the business so done and the earnings so arising. From all of which the complainant insists it is "entitled to have an accounting between the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railroad Company, and its codefendant, the Central Ohio Railroad Company, as reorganized, and your orator, in order that the total amount of local freights provided for in articles thirteen and fifteen of the said Exhibit B shall be ascertained, and the amount which is due to the Pittsburgh, Cincinnati & St. Louis Company, and to the defendant the Central Ohio Railroad Company, as reorganized, as the lessor of your orator." It concludes with a prayer for an account as follows: "And your orator prays that an account be taken under the order and direction of this honorable court, with reference to the local freights so as aforesaid carried, and that your orator be allowed eighty-two and one-half per cent of the total amount of freights carried by both of said parties, and that the defendant herein, the Pittsburgh, Cincinnati & St. Louis Railroad Company, be allowed seventeen and one-half per cent of the total amount thereof, and that thirty-five per cent of the amount allowed to your orator be awarded to be paid as rental to the said defendant herein, the Central Ohio Railroad Company, as reorganized, and that, upon the taking of said accounts, the amount which is found due either of said parties defendants or your orator be directed to be paid within a time to be specified by the court, and, in default of such payment, that execution issue as at law, and your orator prays for such other and further relief as may be deemed best and proper in the premises."

The Central Ohio Company, thus made a defendant, waived service of process, and entered its appearance by an indorsement on the original bill signed by the solicitor for the complainant company as president of the said Central Ohio Company. Its answer was subsequently prepared by the same solicitor, and signed by him as president. This answer admits all the statements of the complainant's bill, and sets up that, under the said contract and lease, "it was entitled to receive as rental 35 per cent of the entire earnings of said Columbus and Newark Division, in carrying local freights thereon, less seventeen and one-half per cent, which, under the said contract contained in Exhibit B, attached to complainant's bill, was to be paid to the said Steubenville & Indiana Railroad Company, and its successor, the defendant

herein, the Pittsburgh, Cincinnati & St. Louis Railway Company." It admitted the receipt of 35 per cent of the local freights carried on said division by the complainant company, but asserted that since June, 1872, it had received no part of the earnings for local freights carried by the Pittsburgh, Cincinnati & St. Louis Railway Company, and averred that it was "now entitled to receive from the plaintiff thirty-five per cent of the freight so earned by the said Pittsburgh, Cincinnati & St. Louis Company," and it asks that "the said complainant be required to account to it for the same." It charges that the lease was subject to the said contract, and avers "that the said complainant had not any authority or power to make any change in said contract, and if said contract was changed, or to be changed, it could be done only by this defendant, by and through its president, properly authorized." It denies knowledge that the Pittsburgh, Cincinnati & St. Louis Railway Company had been engaged in carrying local freights, and that it was not accounting for same, and averred that until within "two or three years it did not know that its rental embraced nothing on account of freight carried by the said Pittsburgh Company;" and denied that it had ever "agreed or assented to said company engaging in carrying said local freight, and in this manner impair the usefulness of said division, and deprive it of a part of the revenues which belonged to it, and of which it is the exclusive owner under its charter, as set out in the complainant's bill of complaint." This answer was indorsed as an answer and cross-petition. No one seems to have been made defendant thereto, and no process issued, none being asked. The Pittsburgh, Cincinnati & St. Louis Railway Company alone answered it as if a formal cross-bill. The Pittsburgh, Cincinnati & St. Louis Railway Company, in its answer, took issue upon every proposition of importance, denied any liability to the said Central Ohio Company, and set out the defenses made in its answer to the original bill. The chief of the defenses thus presented was that in June, 1872, the clauses in regard to the local-freight business had been, by agreement with the complainant company, abrogated and set aside, and an agreement entered into that said local freight business should be done by either company, and revenue derived therefrom be retained by each company; that this agreement had been put in force by an official order issued in June, 1872, by the complainant company, and that from that time each road had done local business, and retained the revenue. That no objection, protest or question had been made to this modification of the original agreement until after the agreement had been in force for more than 10 years. The defense of *ultra*

vires was also set up as to the clauses which prevented either company from carrying local freight when tendered, or from offering to carry such freight. Still another defense denied that the contract had ever been signed or legally executed by the original contracting parties. If valid, that corporation insisted that the successor companies had the power to modify or abrogate the clauses in question, and this power had been exercised with the knowledge and assent of the Central Ohio Company.

Upon this jurisdictional question the learned counsel for appellees contends that the original bill presents two distinct subjects for controversy—one wholly between the complainant and the Pittsburgh, Cincinnati and St. Louis Company, and the other wholly between the complainant and the Central Ohio Company. That in the accounting asked with the Pittsburgh, Cincinnati & St. Louis Railway Company the Central Ohio Company has no interest; and that in the accounting as to rentals since 1872, between complainant as lessee and the Central Ohio Company as lessor, the Pittsburgh, Cincinnati & St. Louis Railway Company has no interest. That all the issues in regard to the due execution of the original agreement of 1865, and in regard to the power of the successor company to modify same, and in regard to the validity of clauses 13 and 15 of that contract, as well as the issue as to the fact of modification, are issues wholly between complainant and the Pittsburgh, Cincinnati and St. Louis Railway Company, with which the Central Ohio Company has no concern. To save the jurisdiction, counsel in effect argue that the bill was multifarious. We are unable to concur with the contention that the Central Ohio Company has no concern in the issue between the companies succeeding to the rights and obligations of the contract of 1865. If the contract of 1865 was never validly executed, then the successor companies did not, by mere succession, become obligated. If clauses 13 and 15 were void, as beyond the power of the contracting companies, then the Pittsburgh, Cincinnati & St. Louis Railway Company cannot be compelled to account for freights earned by it in contravention of a void contract; and, for the same reason, the claim of the Central Ohio Company to 35 per cent of the gross receipts from freights carried by the Pittsburgh, Cincinnati & St. Louis Railway Company must fail. So, if the successor companies had the power to abrogate, abandon, or modify clauses 13 and 15, and did in fact lawfully abandon, abrogate, or modify those provisions, then the claim of the Central Ohio against either of the successor companies falls to the ground.

The Central Ohio was, perhaps, an unnecessary party. Still,

in view of its interest in the maintenance of clauses 13 and 15, as affecting the amount of its income as rentals from its lessee, and of its contention that those clauses should not be abandoned, abrogated, or modified by the successor companies, unless it should assent, it was clearly proper that it should be a party to a controversy so vitally affecting its interests. By bringing it before the court a decree could be obtained which would conclude its claims as lessor or owner, and establish, once for all, the soundness or unsoundness of its contention as to the original validity and irrevocable character of the agreement of 1865 by any arrangement between the successor companies to which it did not assent. In view of this attitude of the Central Ohio toward the issues presented, we cannot say that it was an immaterial party. It certainly was not so regarded by the other litigants nor by the circuit court. Being a proper party, and a party whose interests in the controversy were identical with those of the Baltimore & Ohio Company, it makes a cause in which a corporation of Maryland and a corporation of Ohio are on one side of the controversy, while another corporation of Ohio is a party upon the opposite side. This arrangement operates to deprive the federal court of jurisdiction. The very late case of *Wilson v. Oswego Tp.*, 151 U. S. 56, is a case much in point. There federal jurisdiction was held to be defeated as to a defendant whom the court thought an unnecessary party to the relief sought by the complainant, yet a proper party because of its interest in the controversy. We are clearly of opinion that, while the Central Ohio was not a necessary party to the accounting between the Baltimore & Ohio Railway Company and the Pittsburgh, Cincinnati and St. Louis Railway Company, yet it was, in view of its interest in the issues arising upon that account, a proper party.

The decree must be reversed, with directions to the circuit court to dismiss the bill with costs.

Jurisdiction of United States Courts — Residence and Citizenship of Railroad Companies.—See *Galveston, Harrisburg & San Antonio R. Co. v. Gonzales* (U. S.), 57 Am. & Eng. R. Cas. 71, and note, 89; *Stephens v. St. Louis & San Francisco R. Co.* (C. C.), 50 Am. & Eng. R. Cas. 618, and note, 622; *Fitzgerald v. Missouri Pacific R. Co.* (C. C.), *Id.*, 622, and note, 634; *Conn v. Chicago, Burlington & Quincy R. Co.* (C. C.), *Id.*, 640, and note, 646; *Connor v. Vicksburg & Meridian R. Co.*, 35 Am. & Eng. R. Cas. 35 Am. & Eng. R. Cas. 696, and note, 700; *Angier v. East Tennessee, Virginia & Georgia R. Co.* (Ga.), 20 Am. & Eng. R. Cas. 618, and note, 622.

PLANT INVESTMENT CO.

v.

JACKSONVILLE, TAMPA & KEY WEST R. CO.

(152 *United States*, 71.)

Jurisdiction of Federal Court—Action by Non-resident Assignee of Contract between Domestic Railroad Company and State Board.—A non-resident construction company which has become the assignee of a contract between the trustees of the internal improvement fund of Florida, and a railroad corporation of that state, cannot maintain a suit on the contract in a federal court in that state, since it is within section 629 of the Revised Statute of the United States, which provides that circuit courts of the United States shall not have cognizance of any suit to recover a chose in action in favor of an assignee thereof, unless such suit could have been prosecuted in such court to recover on the cause of action if no assignment thereof had been made. *Following Shoecraft v. Bloxham*, 124 U. S. 730.

APPEAL from the United States circuit court for the northern district of Florida.

Robert G. Erwin and *George E. Hartridge*, for appellant.

John C. & C. M. Cooper, for appellee.

Mr. Justice FIELD stated the case, and delivered the opinion of the court.

This case comes to us on appeal from the decree of the circuit court for the northern district of Florida, sustaining the demurrer to the bill of complaint and dismissing the suit. The bill was brought to enforce the conveyance of certain lands in Florida, pursuant to the contract of the trustees of the internal-improvement fund of Florida, made pursuant to certain statutes of that state, with the Jacksonville, Tampa & Key West Railway Company, a corporation created under its laws, the beneficial results of which contract are claimed by the complainant. Case stated.

The facts out of which the suit arises are given at length in the bill, and, as there set forth, may be briefly stated, so far as is necessary for the presentation of the question of jurisdiction, upon which the demurrer turned.

The Plant Investment Company, the complainant, is a corporation under the laws of Connecticut, having its principal office at New Haven. The defendants are the Jacksonville, Tampa & Key West Railway Company, and the trustees of the internal-improvement fund of Florida, citizens and residents of that state.

The bill of complaint sets forth : That the general assembly of Florida, by an act of January 6, 1855, "to provide for and encourage a liberal system of internal improvements in the state," declared that the lands granted to the state by the acts of congress of March 3, 1845, and September 28, 1850, together with the proceeds thereof, accrued or that might thereafter accrue, should be set apart and made a separate fund, to be called the internal improvement of the state ; and that, for the purpose of assuring a proper application of the fund for the objects mentioned, the lands, and the funds arising from the sale thereof, after paying the necessary expenses of selection, management, and sale, should be vested in five trustees, to wit, in the governor of the state, the comptroller of public accounts, the state treasurer, the attorney general, and the register of state lands, and their successors in office, to hold the same for the uses provided in the act ; and by its twenty-ninth section, the general assembly reserved the right to grant to such railroad companies, thereafter chartered, as they might deem proper, upon their compliance with the provisions of the act as to the manner of constructing the road and the drainage of the land, the alternate sections of the "swamp and overflowed lands" for six miles on each side of the line of the road of any such company. That the Jacksonville, Tampa & Key West Railway Company was incorporated in March, 1878, under the general corporation act of the state, of February, 1874, by the name of the Tampa, Peace Creek & St. John's River Railroad Company. That the legislature of Florida, by act of March 4, 1879, granted to that company alternate sections of the lands given to the state by the act of congress of September 28, 1850, within six miles on each side of the track or line of its road, provided that the company should comply with the specified provisions of the act of January 6, 1855 ; and further granted to the company, in consideration of the greatly improved value which would accrue to the state from the construction of the road, 10,000 acres of the same class of lands for each mile of road it might construct, such lands to be of those nearest to the line of the road, its branches and extensions,—this last-named grant being made subject to the rights of all creditors of the internal-improvement fund, and to the trusts to which the fund was applicable under the act of January 6, 1855. That on the 27th of June, 1881, the Tampa, Peace Creek & St. John's River Railroad Company, by a resolution of its board of directors, changed its corporate name to Jacksonville, Tampa & Key West Railway Company, and on the 23d of August, 1881, filed a plat of its route with the trustees of the internal-improvement fund ; and, on the 1st of September,

1881, the trustees passed a resolution reserving from sale for the benefit of the company the even-numbered sections of land for six miles on each side of its line; and, again, on the 21st of September, 1881, acting under the provisions of the act of the legislature of March 12, 1879, "to amend section 26 of the act 'to provide a general law for the incorporation of railroads and canals,' and to grant aid to railroads and canals incorporated under said act," they passed a resolution to reserve from sale, to further aid in the construction of the road, a quantity of land in the even-numbered sections within twenty miles of said road sufficient to supply the deficiency existing in the even-numbered sections within six miles of the road.

The bill further avers that, in 1883, the complainant entered into a contract with defendant company to construct the southern division of its road, to extend from the waters of Tampa bay, in Hillsborough county, to Kissimmee City, in Orange county, with a branch to or near Bartow, in Polk county, and by that contract was to receive, as a part of the consideration for the construction of the road, all the alternate sections of land to which defendant company was or might be entitled, under any of the aforesaid acts, and any of the laws of Florida, for its construction; that the resolutions passed by the board of trustees September 21, 1881, had been published in the report of its official proceedings, and submitted to the legislature in January, 1883, with the reports of the heads of departments of the state government, and went forth to the world unchallenged as the official action of the trustees, with the silent approval of the legislature; and the complainant, relying on the provisions of the acts of March 4 and 12, 1879, and the resolutions of the trustees, was induced to enter into its contract with the defendant company, believing that it would receive all the lands contemplated by those acts and resolutions; that, to carry out the contract made between the complainant and the defendant company, the board of directors of that company passed a resolution on November, 1883, requesting and directing the trustees of the internal-improvement fund to convey to the complainant all the alternate sections of land to which the defendant company was or might be entitled, by reason of the construction of the said railroad from Tampa to Kissimmee City, and its branch, and a copy of that resolution was presented to the trustees, and entered in the minutes of their proceedings; that, as soon as practicable after making the contract complainant commenced the construction of the road, and completed the line from Tampa to Kissimmee, a distance of 75 miles, by the following January; and the completion of the road being reported to the trustees, the state engineer was directed to inspect the same, which he

did, and approved it, as being built according to the specifications required; whereupon the trustees accepted the same.

That when the complainant applied for the lands which it claimed under the contract with defendant company, it discovered that not only the lands in the even sections within 20 miles, but also within 6 miles of the road, had been selected by one Hamilton Disston, to whom the board of trustees had contracted to sell 4,000,000 acres of land to pay off a large indebtedness of their fund, as a part of his purchase; that the complainant protested to the trustees against permitting said Disston to take these lands, but the trustees decided that the claim of said Disston for any lands outside the 6-mile limit of said road should take precedence of the claim of the defendant company, and of the complainant contractor thereunder.

The bill further sets forth that in February, 1884, the trustees conveyed to the complainant the lands granted to the state by the act of September 28, 1850, lying in the even-numbered sections, and within 6 miles of the line of that portion of the road constructed which then remained undisposed of, viz. 123,481 acres, for the entire 75 miles of the road; and that the complainant is advised and believes that, under the grant of the alternate sections, the defendant company is entitled to 3840 acres of land for each mile of road it constructed, and that, where there is not sufficient land in the alternate sections within 6 miles of the line of the road to make that quantity, the deficiency can be made up from the alternate sections within 20 miles, under the act of March 12, 1879, and resolution of September 21, 1881; and that the complainant, under its contract with the defendant company, has the same right for such part of the road as it has constructed, and alleges that there is a deficiency in the quantity of land to which it is entitled of about 160,000 acres. After stating other matters not material for the consideration of the question presented for our determination, the bill prays that the trustees of the internal-improvement fund be compelled to convey to complainant the necessary lands to make up to the complainant the deficiency claimed, according to the terms of their contract with the defendant railroad company, the complainant asserting its right to the lands necessary to make up this deficiency by virtue of its contract with the defendant railroad company for the construction of the road.

To this bill the defendant trustees of the internal-improvement fund demurred, on the ground, among others, that the court had no jurisdiction in the premises.

The contract between the trustees of the internal-improve-

ment fund of Florida and the defendant railroad company, being a contract between citizens and residents of the same state, could not be enforced by suit in a federal court. The complainant, the Plant Investment Company, claims the benefit of that contract, and seeks to have it enforced for its benefit. It occupies, in fact, the position of assignee of that contract; its only right to the lands depending upon its validity. But it cannot enforce the contract in the federal court; because, by section 629 of the Revised Statutes, it is provided that no circuit court shall have cognizance of any suit to recover the contents of any promissory note, or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such a court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the same provision is contained in the act of March 3, 1887, amendatory of the act to determine the jurisdiction of the circuit courts of the United States. 24 Stat. c. 373, p. 552. As we said in the case of *Shoecraft v. Bloxham*, 124 U. S. 730, 735, "the terms used—'the contents of any promissory note or other chose in action'—were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey this meaning, but they have received a construction substantially to that purport in repeated decisions of this court." And in support of this doctrine, the case of *Corbin v. Black Hawk Co.*, 105 U. S. 659, was cited. In that case a suit brought to enforce the specific performance of a contract was held to be a suit to recover the contents of a chose in action, and, therefore, could not be maintained under the statute in question in a federal court in the name of the assignee, if the assignor could not have maintained such suit.

The complainant is not, it is true, designated in the pleadings or in any formal instrument as assignee of the contract between the trustees of the internal-improvement fund and the defendant railway company, but the term "assignee" in the statute covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim its beneficial interest. The contract under which the complainant claims, to wit, its contract with the defendant company for the construction of the road, transferred to it the beneficial interest of that company in the lands covered by its contract with the trustees, and, therefore brings the suit within the prohibition of section 629 of the Revised Statutes.

It follows that the circuit court had no jurisdiction of this case in the name of complainant, but, as the decree below dis-

missed the bill generally, that decree is reversed at the costs of appellant, and the cause remanded, with a direction to dismiss the bill for want of jurisdiction, and without prejudice.

So ordered.

Jurisdiction of Federal Courts.—See preceding case and note.

Action in Federal Court by Assignee of Chose in Action.—See *Vimont v. Chicago & Northwestern R. Co.* (Iowa), 13 Am. & Eng. R. Cas. 176, and note, 179.

Jurisdiction of Federal Courts.—*Action to Determine Controversy as to Municipal-aid Bonds—Addition of Non-residents to Bill of Interpleader by Amendment.*—In *Pearson v. Louisville & S. R. Co.* (U. S. Cir. Ct. D. Ky., May 31, 1892), 60 Fed. Rep. 113, it appeared that a trustee holding county-aid bonds in escrow in accordance with the statute authorizing their issue; in view of a controversy as to the right to the bonds, after the company which originally claimed them had assigned its right, filed a bill of interpleader for adjudication of the conflicting claims of the county and of the company; that the assignee of the railroad company was not made a party to the bill, and after the filing of the bill assigned its interests in the bonds to certain non-residents who were subsequently by amendment added as parties defendant, and it was held that the non-resident assignees were not *lis pendens* purchasers, and therefore had a right to remove the suit, although there was no diversity of citizenship as between the original parties to the bill.

Rights of Non-resident Assignee of Chose in Action.—In *Jackson & Sharp Co. v. Pearson* (U. S. Cir. Ct. App., May 13, 1892), 60 Fed. Rep. 113, it was held that a non-resident assignee of the rights of a domestic railroad company to county aid bonds deposited in escrow with a trustee, in accordance with the act authorizing their issue, was an assignee of a chose in action within section 629 of the Revised Statute of the United States, declaring that no circuit court of the United States shall have cognizance of any suit to recover on a chose in action, unless such suit might have been prosecuted in such court if no assignment had been made. *Citing* *Deshler v. Dodge*, 16 How. 622; *Bushnell v. Dodge*, 9 Wall. 390; *Barney v. Banks*, 5 Blatch. 115; *Corbin v. Black Hawk Co.*, 105 U. S. 659; *Shoecraft v. Bloxham*, 124 U. S. 785; *Kings Bridge Co. v. Otne Co.*, 120 U. S. 225; *Metcalf v. City of Watertown*, 128 U. S. 588; *Blacklock v. Small*, 127 U. S. 99.

GERLING, Adm'r. of MARTIN,

v.

BALTIMORE & OHIO R. CO.

(151 *United States*, 673.)

Citizenship of Baltimore and Ohio Railroad Company—Right to Remove Cause from State Court in West Virginia.—The Baltimore & Ohio Railroad Company, a corporation created under the laws of Maryland, which operates its line in West Virginia by force of the Virginia statute of March 6, 1847, and by license of the State of West Virginia, has the right when sued in a state court in the latter state by a citizen thereof to remove the suit to

a circuit court of the United States, and cannot be deprived of that right by the statutes of the state.

Binding Effect on Federal Courts of State Statutes Creating Railroad Corporations or Authorizing them to Exercise Franchises.—State statutes creating railroad corporations, or authorizing them to exercise their franchises within the state, if deemed by the courts of the state public acts, of which they will take judicial notice without proof, must be judicially noticed by the circuit courts of the United States sitting within the state and by the supreme court of the United States on review.

Removal of Causes—Time of Filing Petition in State Court.—Under the act of March 3d, 1887, requiring a petition for removal of a suit to be filed in a state court at the time or any time before the defendant is required by the laws of the state or by the rules of the state court in which such suit is brought to answer or plead to the declaration or complaint, the petition must be filed in the state court so soon as defendant is required to make any defense whatever in that court.

Same—Effect of State Statutes and Practice.—By the statutes and practice of West Virginia, where a formal judgment of default not affecting the defendant's right to interpose a defense upon the merits has been entered confirming a judgment by default, so that a plea to the jurisdiction or in abatement cannot be filed without special leave of the court, a petition for removal filed after such confirmation is too late.

Same—Waiver of Objection to Petition Filed Too Late.—An objection that a petition was filed too late is waived by not taking it in the court below, and cannot be raised for the first time in the supreme court.

Statutory Abatement of Action for Personal Injuries—Effect on Writ of Error Sued Out.—By the laws of West Virginia an action to recover damages for personal injuries abates by the death of the original plaintiff, consequently, after a judgment for the defendant in such a case, a writ of error sued out in that state likewise abates by the death of the plaintiff in error.

Mr. Justice HARLAN dissenting.

ERROR to the circuit court of the United States for the district of West Virginia.

Danl. B. Lucas, for plaintiff in error.

John K. Cowen, for defendant in error.

Mr. Justice GRAY delivered the opinion of the court.

This was an action of trespass on the case, brought March 1, 1888, in the circuit court of Berkeley county, in the state of West Virginia, by John W. Martin against the Baltimore & Ohio Railroad Company, to recover damages in the sum of \$10,000 for personal injuries caused to the plaintiff by the defendant's negligence at Bayview, in the state of Maryland, on May 22, 1887. Case stated.

On April 12, 1888, the defendant filed in that court a petition, with proper affidavit and bond, for the removal of the case into the circuit court of the United States for the district of West Virginia, upon the ground that at the commencement of the suit, and ever since, the plaintiff was a citizen of West Virginia, and the defendant a corporation and citizen of Maryland. On April 24, 1888, the plaintiff was permitted by the

state court, against the defendant's objection, to file an answer to the petition for removal, denying that the defendant was a non-resident corporation, and alleging that it was, for all the purposes of this suit, a resident of West Virginia, and therefore not entitled to remove the case; and the court, upon a hearing upon that petition and answer, "taking judicial notice of the statutes incorporating the defendant in Virginia and in this state, and being of opinion that said Baltimore & Ohio Railroad Company is not a non-resident corporation," refused to allow the removal.

But the circuit court of the United States, on June 11, 1888, upon the production by the defendant of a duly-certified copy of the record of the above proceedings, ordered the case to be docketed in that court, and on July 23, 1888, ordered it to be removed into that court.

On December 13, 1888, the plaintiff filed in that court a plea (called in the record a "plea in abatement") that it ought not to take further cognizance of the action, because, before and at the time of the removal, the defendant "was, and is now, a resident of the district of West Virginia, and is therefore not entitled to remove said action' to that court. A demurrer to that plea was filed by the defendant, and sustained by the court. "And thereupon," as the record stated, "the plaintiff moved to remand this action to the circuit court of Berkeley county, which motion the court overruled."

The defendant then pleaded not guilty. Upon the issue joined on this plea, the case was tried by a jury, the plaintiff and other witnesses testified in his favor, a verdict was rendered for the defendant under instructions of the court, and judgment was rendered upon the verdict.

The plaintiff duly excepted to those instructions, and sued out this writ of error, which was entered in this court on January 13, 1890, together with an assignment of errors, in which the only error assigned to the sustaining of the demurrer to the plaintiff's plea, or to the denial of his motion to remand, was as follows: "The circuit court erred in sustaining the demurrer of the said defendant in error to the plaintiff's plea in abatement, and in overruling the motion of the plaintiff in error to remand the said cause to the state court, whence it had been removed to said circuit court of the United States; thus deciding, both in sustaining said demurrer and in overruling said motion, that the Baltimore & Ohio Railroad Company was a non-resident of West Virginia, and entitled to remove."

The other errors assigned were in rulings and instructions at later stages of the case, which it will not be necessary to consider.

At the present term of this court the plaintiff's death was suggested, and Gerling, his administrator, appointed by the county court of Berkeley county, in West Virginia, came in to prosecute in his stead; and the defendant moved to dismiss the writ of error, because an action for personal injuries abated by the death of the plaintiff.

It was argued, in behalf of the administrator, that the removal from the state court gave the circuit court of the United States no jurisdiction of this case for two reasons: (1) That the Baltimore & Ohio Railroad was a resident corporation of the state of West Virginia; (2) that the application to the state court for removal was not made in time.

The consideration of this argument naturally takes precedence, because, if the courts of the United States never lawfully acquired jurisdiction of the case, they have no rightful power to determine any question of the liability of the defendant, or of the right of the original plaintiff in his lifetime, or of his administrator since his death, to maintain this action, but all such questions can only be determined in the courts of the state in which the action was brought; and, therefore, if the circuit court of the United States has no jurisdiction of the case its judgment should be reversed, for want of jurisdiction, with directions to remand the case to the state court, without passing upon the right to maintain the action in a competent tribunal.

1. The act of March 3, 1887, c. 373, which was in force at the time of the removal of this cause, authorized any civil action brought in a court of a state between citizens of different states, and in which the matter in dispute exceeded, exclusive of interest and costs, the sum or value of \$2000, to be removed into the circuit court of the United States "by the defendant or defendants therein, being non-residents of that state." 24 Stat. 552. In order to be a "non-resident of that state," within the meaning of this statute, the defendant must be a citizen of another state, or a corporation created by the laws of another state. *Machine Co. v. Walthers*, 134 U. S. 41; *Shaw v. Mining Co.*, 145 U. S. 444, 37 Am. & Eng. Corp. Cas. 24; *Southern Pac. Co. v. Denton*, 146 U. S. 202; *Martin v. Snyder*, 148 U. S. 663.

Removal of
causes.

A railroad corporation created by the laws of one state may carry on business in another, either by virtue of being created a corporation by the laws of the latter state also, as in *Railroad Co. v. Vance*, 96 U. S. 450; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 13 Am. & Eng. R. Cas. 172; *Clark v. Barnard*, 108 U. S. 436; *Stone v. Farmers' Co.*, 116 U. S. 307, 23 Am. & Eng. R. Cas. 577; and *Graham v. Railroad Co.*, 118 U. S. 161, 25 Am. & Eng. R. Cas. 53; or by virtue of a license,

permission, or authority, granted by the laws of the latter state, to act in that state under its charter from the former state. *Railroad Co. v. Harris*, 12 Wall. 65; *Railroad Co. v. Koontz*, 104 U. S. 5, 4 Am. & Eng. R. Cas. 105; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 24 Am. & Eng. R. Cas. 58; *Goodlett v. Railroad Co.*, 122 U. S. 391, 33 Am. & R. Cas. 1; *Marye v. Railroad Co.*, 127 U. S. 117. In the first alternative, it cannot remove into the circuit court of the United States a suit brought against it in a court of the latter state by a citizen of that state, because it is a citizen of the same state with him. *Memphis & C. R. Co. v. Alabama*, above cited. In the second alternative, it can remove such a suit, because it is a citizen of a different state from the plaintiff. *Railroad Co. v. Koontz*, above cited.

Whether the Baltimore & Ohio Railroad Company had the right to remove into the circuit court of the United States this action, brought against it by a citizen of West
Status of Balt. & O. R. Co. Virginia in a court of that state, therefore, depends upon the question whether this company was a corporation created by the laws of Maryland only, or by the laws of West Virginia also.

This company, as is admitted, was originally incorporated by the statute of Maryland of February 28, 1827 (1826, c. 123), entitled "An act to incorporate the Baltimore and Ohio Railroad Company," by which subscriptions to its capital stock were to be received by commissioners therein appointed, rights to subscribe for certain amounts of stock were reserved to the state of Maryland and to the city of Baltimore, and, as soon as a certain amount had been subscribed for, it was to become a corporation by the name of the Baltimore & Ohio Railroad Company, capable of purchasing, holding, and selling real and personal property, and of suing and being sued by that name, and to enjoy all the powers, rights, and privileges of a corporation. Its general meetings were to be held and directors chosen annually in Baltimore, and the president chosen by the directors; and the president and directors were authorized to increase the capital stock, to declare dividends, and to construct and maintain a railroad from the city of Baltimore to the Ohio river, and to purchase or take property for this purpose, making compensation to the owners.

In support of the proposition that this company had no right to remove the case into the circuit court of the United States, several legislative acts and judicial decisions of Virginia and West Virginia were relied on, which require examination.

In West Virginia, statutes of that state, or of the parent state of Virginia, creating railroad corporations, or licensing

and authorizing them to exercise their franchises within the state, are deemed public acts, of which the courts of the state take judicial notice, without proof. *Hart v. Railroad Co.*, 6 W. Va. 336, 349-358; *Mahany v. Kephart*, 15 W. Va. 609, 624; *Henen v. Railroad Co.*, 17 W. Va. 881, 899, 9 Am. & Eng. R. Cas. 496; *Bank v. Macher*, 18 W. Va. 271. Doubtless, therefore, such statutes must be judicially noticed by the circuit court of the United States, sitting within the state of West Virginia and administering its laws, and by this court on writ of error to that court. *Drawbridge Co. v. Shepherd*, 20 How. 227, 232.

By the statute of Virginia of March 8, 1827, c. 74, entitled "An act to confirm a law, passed at the present session of the general assembly of Maryland, entitled 'An act to incorporate the Baltimore and Ohio Railroad Company,'" and reciting that act in full, it was enacted that "the same rights and privileges shall be and are hereby granted to the aforesaid company within the territory of Virginia, as are granted to them within the territory of Maryland; the said company shall be subject to the same pains, penalties, and obligations, as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the state of Maryland, or to the citizens thereof, are hereby reserved to the state of Virginia and her citizens;" excepting as to the location of the railroad in Virginia, and the property to be taken for its construction; and excepting, also, that any injury at any time done to the road within the limits of Virginia should be punished according to its laws in force for the protection of its public works.

By the statute of Virginia of March 6, 1847, c. 99, it was enacted that "the Baltimore and Ohio Railroad Company be and they are hereby authorized to complete their road through the territory of this commonwealth" to Wheeling, in Virginia, upon certain conditions, including the following:

By section 6, "said company shall be subject to the provisions of" the statute of Virginia of March 11, 1837, c. 118, "with respect to that portion of their road or other improvements now or hereafter to be constructed within this commonwealth, so far as the same are properly applicable."

By section 7, the stock, property, and profits of said company, so far as the same may be or accrue within this commonwealth, shall be subject to general taxation in like manner and on the same footing with other similar companies within this state: provided, however, that said taxing power shall not be exercised until and unless the net income of the said Baltimore and Ohio Railroad shall exceed six per centum per annum upon their capital invested."

By section 8, "the general assembly hereby reserves to itself the power of hereafter altering, amending or modifying any or any part of the provisions of this act; provided, that the rights of property and franchises acquired under this act, and the free use and enjoyment of their rights and privileges, as granted by this or any other former act now in force, shall not be taken away or impaired by any such further act of legislation."

The statute of Virginia of March 11, 1837, c. 118 (referred to in section 6 of the statute of 1847, above cited), was entitled "An act prescribing certain regulations for the incorporation of railroad companies," and began by enacting that "whenever it shall be deemed necessary by the general assembly to grant a charter for the incorporation of a company to construct a railroad, the following general provisions shall be deemed and taken to be a part of the said charter or act of incorporation, to the same effect as if the same were expressly re-enacted in reference to any such charter or act, except so far as such charter or act may otherwise expressly provide." Those general provisions related to the exercise of the right of eminent domain, and the payment of compensation for property taken or injured; the time of completing the works of a company so incorporated; the annulling of its charter by the state of Virginia in case it should afterwards fail to keep its road in repair, and to afford the intended accommodation to the public, for three successive years; the right and duty of transporting persons and property; and other matters not necessary to be specified.

Upon the division of the state of Virginia, and the admission of West Virginia into the Union as a state, that part of the Baltimore & Ohio Railroad which had been within the state of Virginia came within the state of West Virginia. See Act Cong. Dec. 31, 1862, c. 6; 12 Stat. 633; *Virginia v. West Virginia*, 11 Wall. 39. But the General Statutes of West Virginia, cited for the plaintiff, do not appear to have any important bearing upon this part of the case.

The statutes of West Virginia of 1872, c. 227, § 16, and 1882, c. 97, § 30, by which all railroad corporations "doing business in this state under charters granted and laws passed by the state of Virginia or this state" are declared to be domestic corporations, were evidently aimed at those companies which had been made corporations by either state, whether under special charters or general laws, and were probably intended to make sure that corporations created by Virginia before the separation of West Virginia, and doing business within the territory of the latter, should be considered corporations of

this state, and cannot reasonably be construed as including corporations created by some other state only.

Section 30 of chapter 54 of the Code of West Virginia authorizes any corporation duly incorporated by the laws of any other state to hold property and transact business in West Virginia, "upon complying with the requirements of this section, and not otherwise." These requirements are that every such corporation shall file with the secretary of state a copy of its charter, or of its articles of association and of the law under which it is incorporated, and shall receive from him a certificate of the fact, and file this certificate with the clerk of a county in which its business is conducted. By a further provision of this section, "every railroad corporation, doing business in this state under the provisions of this section, or under charters granted or laws passed by the state of Virginia, or this state, is hereby declared to be, as to its works, property, operations, transactions, and business in this state, a domestic corporation, and shall be so held and treated in all suits and legal proceedings which may be commenced or carried on by or against any such railroad corporation, as well as in all other matters relating to such corporation." It then prohibits, under penalties, any "railroad corporation, which has a charter or any corporate authority from any other state," to do business or to bring any action in the state, until it has filed with the secretary of state a writing under its corporate seal accepting the provisions of this section. This section does not make any corporation of another state, which has neither complied with its requirements, nor been previously made a corporation by special charter or general law of Virginia or of West Virginia, a domestic corporation of West Virginia. It has not been proved or suggested that the Baltimore & Ohio Railroad Company ever complied with the requirements of this section. Nor, as has been seen, had it been previously made a corporation by any statute of West Virginia.

The question under consideration, therefore, turns upon the construction and effect of the statutes of Virginia above referred to.

The position that by force of those statutes of Virginia the Baltimore & Ohio Railroad Company became a corporation of Virginia, and consequently of West Virginia, is sought to be maintained by expressions of opinion to that effect by the court of appeals of Virginia in *Railroad Co. v. Gallahue* (1855), 12 Grat. 655, and by the supreme court of appeals of West Virginia in *Goshorn v. Supervisors* (1865), 1 W. Va. 308, and in *Baltimore & O. R. Co. v. Supervisors, etc., of Marshall Co.* (1869), 3 W. Va. 319. But in the first case the

point decided was that the Baltimore & Ohio Railroad Company was liable to be sued in Virginia; the second case concerned the validity of a county subscription to stock of a railroad company incorporated in Pennsylvania, and authorized by a statute of Virginia to construct a railroad therein; and the third case involved only the right of the state of West Virginia to tax the Baltimore & Ohio Railroad Company.

On the other hand, this court, in *Railroad Co. v. Harris*, (1870), 12 Wall. 65, upon great consideration, and with those cases before it, was clearly of opinion that neither the statutes of Virginia, nor a similar act of congress as to the District of Columbia, made the Baltimore & Ohio Railroad Company a new corporation; and this for cogent and satisfactory reasons, which were stated by Mr. Justice Swayne, in delivering judgment, as follows: "In both, the original Maryland act of incorporation is referred to, but neither, expressly or by implication, create a new corporation. The company was chartered to construct a road in Virginia, as well as in Maryland. The latter [a mistake for "former," as it evidently means in Virginia] could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same, as to powers, privileges, obligations, restrictions, and liabilities, as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license, and nothing more. It was given to the Maryland corporation as such, and that body was the same, in all its elements and in its identity, afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged." 12 Wall. 81. This court then expressed its concurrence in the view taken in *Railroad Co. v. Gallahue*, 12 Grat. 655, that the company was suable in Virginia, and decided that it was likewise suable in the District of Columbia, concluding its discussion of the subject by saying: "Looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought, in all respects as if it had been an independent corporation of the same locality." 12 Wall. 83, 84.

In *Baltimore & O. R. Co. v. Pittsburgh, W. & K. R. Co.*, (1881), 17 W. Va. 812, 10 Am. & Eng. R. Cas. 444, a petition of the Baltimore & Ohio Railroad Company for the removal into the circuit court of the United States of a proceeding for the taking of some of its land for the railroad of a West

Virginia corporation was denied by the courts of West Virginia upon the ground that the federal courts could under no circumstances have jurisdiction of such cases. *Id.* 866, 867. That decision is inconsistent with the decisions of this court. *Boom Co. v. Patterson*, 98 U. S. 403, 407; *Union Pac. Ry. Co. v. Kansas City*, 115 U. S. 1, 19, 20 Am. & Eng. R. Cas. 324; *Searl v. School Dist.*, 124 U. S. 197. But (which directly bears upon the question now before us) the highest court of West Virginia, in that case, after referring to the cases in 12 Grat. and in 1 and 3 W. Va., and quoting at length from the opinion of this court in *Railroad Co. v. Harris*, including the passages above cited, said: "If this be true, we need not differ as to whether the act of Virginia was a charter to the Baltimore & Ohio Railroad Company, or a license of the character described. The result would be the same in either case. The effect would be to make it *quoad* all its bearings, [business?] contracts, etc., in West Virginia, liable to suit here, the same as if it were a corporation of West Virginia." 17 W. Va. 875. The decisions in *Henen v. Railroad Co.*, *Id.* 881, 9 Am. & Eng. R. Cas. 496, and *Quarrier v. Railroad Co.*, 20 W. Va. 424, 18 Am. & Eng. R. Cas. 535, simply follow that case, and we have been referred to no later decision of that court upon the subject.

There does not appear, therefore, to be such a settled course of adjudication in the courts of West Virginia that the Baltimore & Ohio Railroad Company has been made by the statutes of Virginia a corporation of that state, and of the state of West Virginia, as should induce this court, when the question arises under an act of congress defining the jurisdiction of the courts of the United States, to surrender its own opinion, and to reverse the conclusion at which it deliberately arrived in *Railroad Co. v. Harris*, and which it has since repeatedly approved. *Railway Co. v. Whitton*, 13 Wall. 270, 285; *Ex parte Schollenberger*, 96 U. S. 369, 376; *Railroad Co. v. Vance*, *Id.* 450, 458; *Railroad Co. v. Koontz*, 104 U. S. 5, 9, 13; 4 Am. & Eng. R. Cas. 105; *Goodlett v. Railroad Co.*, 122 U. S. 391, 402, 403, 33 Am. & Eng. R. Cas. 1.

The Baltimore & Ohio Railroad Company, not being a corporation of West Virginia, but only a corporation of Maryland, licensed by West Virginia to act as such within its territory, and liable to be sued in its courts, had the right, under the constitution and laws of the United States, when so sued by a citizen of this state, to remove the suit into the circuit court of the United States, and could not have been deprived of that right by any provision in the statutes of the state. *Insurance Co. v. Morse*, 20 Wall. 445; *Barron v. Burn-*

side, 121 U. S. 186, 17 Am. & Eng. Corp. Cas. 222; Southern Pac. Co. v. Denton, 146 U. S. 202, 207.

2. The other objection taken in argument to the validity of the removal of the case into the circuit court of the United States is that the petition for removal was not seasonably filed in the state court under the provision of the act of congress of 1887 by which any party entitled to remove such a suit from a state court into the circuit court of the United States "may make and file a petition in such suit in such state court at the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." 24 Stat. 554. The original summons in this case was issued by the state court on March 3, 1888, returnable at the rules to be held on the first Monday of March, 1888, which was March 5th, and was served, as appeared by the officer's return, at 11 a. m. of March 5th, the statutes of the state providing that "any process may be executed on or before the return day thereof." Code W. Va. 1884, c. 124, § 2.

On the record of that court were the following minutes: "March rules, 1888: Declaration filed and common order. April rules, 1888: Common order confirmed and W. E."

The meaning of these minutes is that the plaintiff, having filed his declaration at the rule day on which the summons was returnable, and the defendant having failed to appear on that day, there was thereupon entered in the clerk's office, as authorized by the statutes of the state, a conditional judgment, or judgment *nisi*, known as the "common order," that judgment be entered for the plaintiff unless the defendant should appear and plead at the next rules; and at April rules, the defendant continuing in default, the clerk entered, pursuant to those statutes, an office judgment, confirming the former one, with an order or writ of inquiry of damages. Code W. Va. c. 125, §§ 1, 6; 4 Minor, Inst. 599, 601.

By the statutes and practice of the state, this office judgment would, if not set aside, become a final judgment on, and not before, the last day of the next succeeding term. But the defendant might, at any time before the end of that term, "appear and plead to issue,"—that is to say, answer to the merits of the action, either by plea in bar or by demurrer; and, if he did so appear and plead within that time, the office judgment, not having been entered up in court, nor the writ or order of inquiry executed, would be set aside as of course, and the case stand for trial upon the merits. In short, either judgment in the clerk's office was merely a formal judgment

of default, not affecting the defendant's absolute right to interpose any defense upon the merits. But at a subsequent term, or if the office judgment had been confirmed by the court, or the writ of inquiry executed, he could not, without leave of court, file any plea whatever. A plea to the jurisdiction, or in abatement, if it could have been filed after the common order or conditional judgment in the clerk's office, certainly could not be filed, without special leave of the court, after the office judgment confirming that order, and therefore, in this case, upon the most liberal construction possible, not after the April rules. Code W. Va. c. 125, §§ 16, 46, 47; 4 Minor, Inst. 601, 605; *Resler v. Shehee*, 1 Cranch, 110; *Furniss v. Ellis*, 2 Brock, 14, Fed. Cas. No. 5162; *Hinton v. Ballard*, 3 W. Va. 582; *Delaplain v. Armstrong*, 21 W. Va. 211.

The defendant's petition for the removal of the case into the circuit court of the United States was not filed at the rules, either in March or in April. But it was afterwards filed in and heard by the state court before the end of the April term. It was, therefore, filed at or before the time at which the defendant was required by the laws of the state to answer or plead to the merits of the case, but after the time at which he was required to plead to the jurisdiction of the court, or in abatement of the writ.

Was this a compliance with the provision of the act of congress of 1887, which defines the time of filing a petition for removal in the state court? We are of opinion that it was not, for more than one reason. This provision allows the petition for removal to be filed at or before the time when the defendant is required by the local law or rule of court "to answer or plead to the declaration or complaint." These words make no distinction between different kinds of answers or pleas; and all pleas or answers of the defendant, whether in matter of law, by demurrer, or in matter of fact, either by dilatory plea to the jurisdiction of the court or in suspension or abatement of the particular suit, or by plea in bar of the whole right of action, are said, in the standard books on pleading, to "oppose or answer" the declaration or complaint which the defendant is summoned to meet. Steph. Pl. (1st Am. Ed.) 60, 62, 63, 70, 71, 239; Lawes, Pl. 36. The judiciary act of September 24, 1789, c. 20, § 12, required a petition for removal of a case from a state court into the circuit court of the United States to be filed by the defendant "at the time of entering his appearance in such state court." 1 Stat. 79. The recent acts of congress have tended more and more to contract the jurisdiction of the courts of the United States, which had been enlarged by intermediate acts, and to restrict it more nearly within the limits of the earliest stat-

ute. *Car Co. v. Speck*, 113 U. S. 84; *Smith v. Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467; *Shaw v. Mining Co.*, 145 U. S. 444, 449, 37 Am. & Eng. Corp. Cas. 24.

Construing the provision now in question, having regard to the natural meaning of its language, and to the history of the legislation upon this subject, the only reasonable inference is that congress contemplated that the petition for removal should be filed in the state court as soon as the defendant was required to make any defense whatever in that court, so that, if the case should be removed, the validity of any and all of his defenses should be tried and determined in the circuit court of the United States.

As the petition for the removal of this case into the circuit court of the United States was not filed in the state court within the time mentioned in the act of congress, it would follow that, if a motion to remand upon that ground had been made promptly, and denied, the judgment of the circuit court of the United States must have been reversed, with directions to remand the case to the state court. *Edrington v. Jefferson*, 111 U. S. 770; *Railroad Co. v. Burns*, 124 U. S. 165.

3. But the record, as appears by the statement of the material parts thereof at the beginning of this opinion, not only does not show that any such objection to the removal was made, either in the state court or in the circuit court of the United States, but clearly implies that it was not, and that the only objection made in either court to the jurisdiction of the circuit court of the United States was that the defendant, as well as the plaintiff, was a citizen of West Virginia; and the assignment of error in this respect is expressly so limited.

The question therefore arises whether the objection to the time of filing the petition for removal can be raised for the first time in this court, or must be held to have been waived by not taking it below.

The time of filing a petition for the removal of a case from a state court into the circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the national court, under the constitution of the United States, like the fundamental condition of a controversy between citizens of different states. But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the circuit court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district. *Gracie v. Palmer*, 8 Wheat. 699; *Taylor v. Long-*

Waiver of
objection.

worth, 14 Pet. 172, 174; *Railway Co. v. McBride*, 141 U. S. 127; *Railway Co. v. Cox*, 145 U. S. 593; *Trust Co. v. George*, 151 U. S. 129.

That the jurisdiction of the circuit court of the United States over a case removed into it from a state court cannot be defeated upon the ground that the petition for removal was filed too late, if the objection is not taken until after the case has proceeded to trial in the circuit court of the United States, has been distinctly decided by this court.

In *French v. Hay*, 22 Wall. 238, the case had been removed under the act of March 2, 1867, c. 196 (14 Stat. 558), re-enacted in Rev. St. § 639, cl. 3, which required the petition to be filed "before the final hearing or trial" in the state court. The circuit court of the United States denied a motion to remand, made, as the report states, because the act "had not been complied with in respect to time and several other important particulars;" and this court, on appeal, approved its action, and, speaking by Mr. Justice SWAYNE, said: "The objection made in the court below touching the removal of the case from the state court, and which objection has been renewed here, was not made in the court below until the testimony was all taken, the case was ready for hearing, and nearly three years had elapsed since the transfer was made. The objection came too late. Under the circumstances, it must be held to have been conclusively waived." And *Taylor v. Longworth*, above cited, was referred to as in point. 22 Wall. 244, 245.

The reasons in support of this conclusion were stated at length in *Ayers v. Watson*, 113 U. S. 594, which was brought up by writ of error from the circuit court of the United States, into which the case had been removed under the act of March 3, 1875, c. 137, since amended by the act of 1887 in no material respect bearing upon the present inquiry, except in fixing an earlier time for filing the petition for removal in the state court, by requiring it to be filed at or before the time when the defendant is required to answer or plead, instead of (as it was in the act of 1875) "before or at the term at which such cause could be first tried and before the trial thereof." The two acts are printed side by side in 120 U. S. 786-794.

In *Ayres v. Watson*, Mr. Justice BRADLEY, speaking for the whole court, after observing that "the application for removal was, beyond question, too late, according to the act of 1875," which governed the case, and that the court was therefore compelled to examine the effect of the act of 1875 when the application was made at a later period of time than was allowed by that act, and stating the substance of section 2 of that act, defining the classes of cases which might be removed into the circuit court of the United States, said: "This is the

fundamental section, based on the constitutional grant of judicial power. The succeeding sections relate to the forms of proceeding to effect the desired removal." "The second section defines the cases in which a removal may be made. The third prescribes the mode of obtaining it, and the time within which it should be applied for. In the nature of things, the second section is jurisdictional, and the third is but modal and formal. The conditions of the second section are indispensable, and must be shown by the record. The directions of the third, though obligatory, may, to a certain extent, be waived. Diverse state citizenship of the parties, or some other jurisdictional fact prescribed by the second section, is absolutely essential, and cannot be waived; and the want of it will be error, at any stage of the cause, even though assigned by the party at whose instance it was committed. *Railway Co. v. Swan*, 111 U. S. 379. Application in due time, and the proffer of a proper bond, as required in the third section, are also essential, if insisted on, but, according to the ordinary principles which govern such cases, may be waived, either expressly or by implication. We see no reason, for example, why the other party may not waive the required bond, or any informalities in it, or informalities in the petition, provided it states the jurisdictional facts; and, if these are not properly stated, there is no good reason why an amendment should not be allowed, so that they may be properly stated. So, as it seems to us, there is no good reason why the other party may not also waive the objection as to the time within which the application for removal is made. It does not belong to the essence of the thing. It is not, in its nature, a jurisdictional matter, but a mere rule of limitation. In some of the older cases the word 'jurisdiction' is often used somewhat loosely, and no doubt cases may be found in which this matter of time is spoken of as affecting the jurisdiction of the court. We do not so regard it. And, since the removal was effected at the instance of the party who now makes the objection, we think that he is estopped. 113 U. S. 597-599.

In that case, it is true, it was the party who had removed the case into the circuit court of the United States who afterwards objected to the jurisdiction of that court because the removal was not in time, and was held to be estopped to do so. But if due time of removal had been made, by the act of congress, a jurisdictional fact, neither party could waive, or be estopped to set up, the want of it; but, as observed by Mr. Justice BRADLEY in the passage above quoted, and directly adjudged in *Railway Co. v. Swan*, cited by him, the fact would be absolutely essential, and the want of it would be error, at any stage of the cause, even though assigned by the party at whose instance it was committed. His whole course

of reasoning leads up to the conclusion that the time of removal, not being a jurisdictional and essential fact, is a subject of waiver and estoppel alike.

The incidental suggestion, in that opinion, that the petition for removal might be amended in the circuit court as to the form of stating the jurisdictional facts, assumes that those facts are already substantially stated therein, and accords with later decisions, by which such amendments may be allowed when, and only when, the petition, as presented to the state court, shows upon its face sufficient ground for removal. *Carson v. Dunham*, 121 U. S. 421, 427; *Crehore v. Railroad Co.*, 131 U. S. 240; *Jackson v. Allen*, 132 U. S. 27.

The decision in *Ayers v. Watson*, as to the waiver in the circuit court of the United States of the objection that the petition for removal had not been seasonably filed in the state court, has never been doubted or qualified. In *Railroad Co. v. Daughtry*, 138 U. S. 298, cited by the plaintiff in the present case, the writ of error was not to the circuit court of the United States, after the case had been removed into that court and tried and determined there; but it was to the state court, which had refused to allow the removal, and the decision of this court was that there was no error in that refusal, if the petition for the removal had not been filed in time to make it the duty of that court to surrender its jurisdiction.

The result is that an objection to the exercise by the circuit court of the United States of jurisdiction over a case otherwise removable, upon the ground that the petition for removal was filed too late, is an objection which may be waived, and that it has been waived in the case at bar.

4. There being no error, of which advantage can be taken at this stage of the case, affecting the jurisdiction of the circuit court of the United States, the next matter to be considered is the defendant's motion to dismiss the writ of error, as having abated by the death of the original plaintiff, because it was an action to recover damages for a personal injury.

Effect of
abatement on
writ of error.

By the judiciary act of September 24, 1789, c. 20, § 31 (1 Stat. 90), following the statute of 8 & 9 Wm. III. c. 11, §§ 6, 7, and since embodied as follows in the Revised Statutes, "when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment," and upon *scire facias* judgment may be rendered for or against him; and "if there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff, or against the surviving defendant, and one or more

of them dies, the writ or action shall not be thereby abated, but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant." Rev. St. §§ 955, 956.

These statutes authorize the executor or administrator to prosecute or defend in those cases only in which the cause of action survives by law, and do not undertake to define what those cases are.

The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question, not of procedure, but of right. As was said by Chief Justice WAITE, speaking for this court: "The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. St. § 955." "The right to proceed against the representatives of a deceased person depends, not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties. *Id.* § 914. But, if the cause of action dies with the person, the suit abates, and cannot be revived. Whether an action survives depends on the substance of the cause of the action, not on the forms of proceeding to enforce it." *Schreiber v. Sharpless*, 110 U. S. 76, 80. In that case the right in question being of an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar the question whether the administrator has a right of action depends upon the law of West Virginia, where the action was brought and the administrator appointed. Rev. St. § 721; *Henshaw v. Miller*, 17 How. 212. The mode of bringing in the representative, if the cause of action survived, would also be governed by the law of the state, except so far as congress has regulated the subject.

The provisions of the Code of West Virginia, which have been supposed in argument to have any bearing upon this subject, are copied in the margin.*

* CHAPTER LXXXV.

OF PERSONAL REPRESENTATIVES; THEIR POWERS AND DUTIES AS TO PERSONAL ASSETS.

Sec. 19. A personal representative may sue or be sued upon any judgment for or against, or any contract of or with his decedent.

Sec. 20. An action on trespass, or trespass on the case, may be main-

Chapter 85, entitled "Of Personal Representatives ; Their Powers and Duties as to Personal Assets," authorizes actions which might have been brought by or against a person in his lifetime to be brought after his death, by or against his personal representative, in no other cases but those of judgments or contracts, or of taking or injuring personal property.

These provisions are copied from the Code of Virginia of 1849, c. 130, §§ 19, 20, and approximately, though not exactly, adopt the rule of the common law that a personal action dies

tained by or against a personal representative for the taking or carrying away of any goods, or for the waste or destruction of, or damage to, any estate of or by his decedent.

CHAPTER CIII.

OF ACTIONS FOR INJURIES.

Sec. 5. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof ; then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death should have been caused under such circumstances as to amount in law to murder in the first or second degree, or manslaughter.

Sec. 6. Every such action shall be brought by and in the name of the personal representative of such deceased person ; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased : provided, that every such action shall be commenced within two years after the death of such deceased person.

CHAPTER CIV.

LIMITATION OF SUITS.

Sec. 12. Every personal action, for which no limitation is otherwise prescribed, shall be brought within five years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative ; and, if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after.

[The only limitations of personal actions, otherwise prescribed in the Code, are of actions for injuries causing death, in chapter 103, § 6, above quoted ; of actions on recognizances, in chapter 104, § 11 ; on judgments, in chapter 104, § 13, and chapter 139, §§ 10, 11 ; on other contracts, and awards, in chapter 104, §§ 6, 7 ; and of proceedings to avoid voluntary gifts, in chapter 104, § 14.]

CHAPTER CXXVII.

OF THE DEATH OR CHANGE OF PARTIES, AND THE DISCONTINUANCE OF CAUSES NOT PROSECUTED.

Sec. 1. Where a party dies or becomes convict of felony, or insane, or the powers of a party who is a personal representative or committee cease,

with the person, as modified by the English statutes of 4 Edw. III. c. 7, and 3 & 4 Wm. IV. c. 42, § 2. Williams, Ex'rs, pt. 2, bk. 3, c. 1, § 1. In Virginia and West Virginia, except as specified in their own statutes, no action of tort can be maintained by or against the executor or administrator of the person to or by whom the wrong was done. Henshaw v. Miller, 17 How. 212; Harris v. Crenshaw, 3 Rand. (Va.) 14; Curry v. Mannington, 23 W. Va. 14, 18.

The only case of a personal injury, for which an action might have been brought by a person in his lifetime, in which the Code of West Virginia authorizes an action to be brought

if such fact occur after verdict, judgment may be entered as if it had not occurred.

Sec. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be reviewed and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

Sec. 3. If, in any case of appeal, writ of error, or supersedeas, which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if it had not occurred, the appellate court may, in its discretion, enter judgment on decree in such case as if the said fact had not occurred.

Sec. 4. In any stage of any case, a *scire facias* may be sued out for or against the committee of any party who is insane, or a convict; or for or against a party before insane, the powers of whose committee have ceased; or for or against the personal representative of the decedent who, or whose personal representative, was a party; or for or against the heirs or devisees of a decedent who was a party; or for the assignee or beneficiary party; to show cause why the suit should not proceed in the name of him or them. Or where the party dying, or whose powers cease, or such insane person or convict, is plaintiff or appellant, the person or persons for whom such *scire facias* might be sued out may, without notice or *scire facias*, move that the suit proceed in his or their name. In the former case, after service of the *scire facias*, or in the latter case, on such motion if no sufficient cause be shown against it, an order shall be entered that the suit proceed according to such *scire facias* or motion. Any such new party, except in an appellate court, may have a continuance of the case at the term at which such order is entered; and the court may allow him to plead anew, or amend the pleadings, as far as it deems reasonable; but in other respect the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against him before such *scire facias* or motion.

Sec. 5. The clerk of the court in which the case is may issue such *scire facias* at any time, and an order may be entered at rules for the case to proceed in the name of the proper party, although the case be on the court docket.

[The subsequent sections as to discontinuance are not material.]

by his personal representative, is that of a wrongful act, neglect, or default, causing death, in which case chapter 103, entitled "Of Actions for Injuries," provides in sections 5 and 6, following the English statute of 9 & 10 Vict. c. 93, §§ 1, 2 (commonly known as "Lord Campbell's Act"), that the person or corporation who would have been liable if death had not ensued shall be liable to an action by the personal representative of the deceased person. The right of action thus given, although for the same act or neglect for which the person injured would have had a right of action in his lifetime, differs from an action brought by him, both in the ground on which it proceeds, and in the award of damages. It is not a common-law action to recover damages for the injuries suffered by him while he lived, but it is an action given by statute for causing his death. The damages recovered cannot exceed \$10,000, and are no part of the estate of the deceased, and cannot pass by his will, or be reached by his creditors, but, by the express terms of the statute, are to be distributed to his next of kin as if he died intestate, and are not subject to his debts. These sections, therefore, authorizing the personal representative to bring such an action after the death of the person injured, have no tendency to show an intention of the legislature that the representative may prosecute a common-law action brought by that person in his lifetime.

The statute action must be brought within two years after the death. All other actions for personal injuries come within the general provision of the statute of limitations,—chapter 104, § 12, of the Code of West Virginia (corresponding to chapter 149, § 11, of the Code of Virginia),—by which the period of limitation of every personal action, for which no other limitation is prescribed, is fixed at five years, or at one year, depending upon the question whether "it be for the matter of such a nature that, in case a party dies, it can be brought by or against his personal representative."

It is hardly contended that by the law of West Virginia this action could have been begun by an executor or administrator. But it is argued that, having been begun by the person injured, it may be prosecuted by his administrator since his death, under the provisions of chapter 127 of the Code of West Virginia, and especially by virtue of the last clause of section 2 of this chapter.

The chapter is entitled "Of the Death or Change of Parties, and the Discontinuance of Causes not Prosecuted," and all its provisions relate rather to matters of procedure than of substantial right.

By the rule of the common law, *actio personalis moritur cum persona*, the death of the sole plaintiff or of the sole defendant

before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term. *Hatch v. Eustis*, 1 Gall. 160, 162, Fed Cas. No. 6207; *Green v. Watkins*, 6 Wheat. 260, 262. The rule has been modified in England and in this country by various statutes, with the object of avoiding the necessity of bringing a new action when the cause of action survives the personal representative, but not always limited to that object.

Chapter 127 of the Code of West Virginia re-enacts, with some modifications, chapter 173 of the Code of Virginia. After re-enacting the provision of section 1, that, when a party dies after verdict, judgment may be entered as if the death had not occurred, and the provision of section 2, that, in case of the death of any of several plaintiffs or defendants, "the suit may proceed for or against the others, if the cause of action survive to or against them," it adds to this section this clause: "If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

It is argued that, by virtue of this clause, all actions of tort, including libel and slander and all actions for injury to the person may, in case of the death of either party, be prosecuted by or against his personal representative.

However plausible that argument might be if this clause stood alone, and were to be construed by itself, and according to the literal meaning of the words, the clause assumes a different aspect upon considering the connection in which it stands, and the provisions of previous chapters, already mentioned, relating to the survivorship of causes of action.

It would be hardly consistent with the legislative intent, apparent from the objects and the limits of those provisions, to give the clause relied on the effect of allowing all actions of tort whatever to be prosecuted, after the death of the original plaintiff, by his personal representative; and to give it that effect would permit the prosecution, after the death of a sole plaintiff or defendant, of an action which, by the first clause of the same section, if there had been several plaintiffs or defendants, and one only had died, could not have proceeded for or against the others.

Moreover, by the final clause of section 4 of the same chapter, after the personal representative of either party dying has been brought in by *scire facias* or motion, "the case shall proceed to final judgment or decree for or against him, in like manner as if the case had been pending for or against

him before such *scire facias* or motion." But if an action for a personal injury had been pending for or against the personal representative after the death of the person who suffered or committed the injury, the final judgment would have been that the action was abated by the death.

The reasonable inference is that the clause relied on, like the rest of the chapter, is intended only to prescribe the mode of procedure in actions, the cause of which survives, either at common law or by virtue of other chapters of the Code, and that its whole effect is to avoid the necessity of bringing a new action when the right of action so survives, and not to give a new right of action, which did not exist before.

This is the view that has been taken by the highest court of the state whenever the matter has been brought before it.

In *Cunningham v. Sayers*, 21 W. Va. 440, that court, after observing that, at common law, "actions grounded in tort generally died with the person, and actions founded on contract generally survived," went on to say: "When the legislature, in the statute above referred to, used the language, that 'if a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were a cause of action arising out of contract,' it is evident that it referred, in the last clause of the section, to the general common-law rule that 'actions founded on contracts survived.' It was found that great inconvenience arose in following the technical rule of the common law in abating actions, when the personal representative, his heir or devisee, might bring another suit to accomplish substantially the same object had in view by the ancestor in bringing the original suit, and the manifest object of the statute was to enlarge the remedy so that the suit might be revived. It was not the object of the statute to create any new right, and give an action to the heir, devisee, or representative, which he had not at common law; but where the representative, heir, etc., had a right, by suit, to accomplish the same object, substantially, as the ancestor had in view in bringing the suit, that, for convenience, it should not abate on the ancestor's death, but might be revived." And it was upon that construction of the statute that the court grounded its decision that an action of unlawful entry and detainer survived, upon the death of the plaintiff, to his heir, saying: "The suit which the ancestor brought was sufficient to acquire the possession, and the statute intended, in case of his death, that his heirs or devisees, who took his place with reference to that right, may revive the suit and prosecute it." *Id.* 444, 445.

In *Curry v. Mannington*, 23 W. Va. 14, the question whether a right of action of tort for a personal injury, not causing death, would survive to the personal representative of the person injured, was directly presented for adjudication by a plea of the statute of limitations to an action against a town for a personal injury caused by a defect in a highway, and was decided in the negative; the court saying that "under the common law the rule was that all personal actions died with the person, according to the maxim, '*Actio personalis moritur cum personæ*;' " that by successive statutes in England and in this country, and by chapter 85, § 20, of the Code, the personal representative might sue for an injury to the personal estate of the decedent in his lifetime; that "in the cases, however, of injuries to the person, and not to the property or estate, of the decedent, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported either by or against his representative;" and that the only exception to this rule known to the court was in chapter 103, §§ 5, 6, of the Code, "embracing what is known as 'Lord Campbell's Act,' giving a right of action to the representative against any party wrongfully causing the death of his decedent." *Id.* 18.

In *Gainer v. Gainer*, 30 W. Va. 390, 398, whether a suit could be revived by the personal representative, under chapter 127, was treated as depending upon the question whether, by other laws of the state, the cause of action survived.

A like view was taken by the court of appeals of Maryland of similar statutes of that state, published in 2 *Kitty's Laws of Maryland*. By the act of 1875, c. 80, § 1, it was enacted "that no action, brought or to be brought, in any court of law in this state, shall abate by the death of either of the parties to such action; but upon the death of any defendant, in a case where the action by such death would have abated before this act, the action shall be continued," and, in a real action, "the heir or devisee of the deceased, or tenant in possession, or other proper person to defend in such action," and, in an action "to recover personal chattels, debt, or damages," the executor or administrator, or other proper person to defend, might appear or be summoned in; "and in case the plaintiff or plaintiffs, in any action aforesaid, shall die before the same may be tried and judgment given, and such death would abate the action before this act, the appearance of the heir, devisee, executor, or administrator, as the case may require, or other proper person to prosecute such suits, shall be admitted to be entered to the same." And the act of 1798, c.

101, subc. 14, § 4, provided that "no personal action shall abate by the death of either party, but executors and administrators shall notice and conform to the directions of the act of 1785, c. 80, respecting their prosecution or defense of such action." Notwithstanding the broad terms of those statutes, the court of appeals held that an action against a railroad company for a personal injury was abated by the death of the plaintiff, saying: "Suits for injuries to the person or character die with the person, and cannot be maintained by the representatives of the deceased party. Before the acts of 1785, c. 80, and 1798, c. 101, subc. 14, § 4, all personal actions abated by the death of a party, and it was necessary for his representatives to commence the action anew; and the object of those acts was to prevent this inconvenience and delay, and to enable the representatives of deceased parties to prosecute such actions as had been instituted by their decedents during their lives, and which did not die with the person. Those acts never intended, however, to prevent the abatement of actions which died with the person." *Railroad Co. v. Ritchie*, 31 Md. 191, 198, 199.

In an action for a personal injury, a similar decision was made in England under the common-law procedure act of 1852 (St. 15 & 16 Vict. c. 76), which provided, in section 135, that "the death of a plaintiff or defendant shall not cause the action to abate, but it may be continued as hereinafter mentioned;" in section 136, that, when one of two or more plaintiffs or defendants should die, the action should proceed, if the cause of action survived to or against the others; in section 137, that "in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative, and the action shall thereupon proceed," "and such judgment shall follow upon the verdict in favor of or against the person making such suggestion, as if such person were originally the plaintiff;" and in section 138, that "in case of the death of a sole defendant or sole surviving defendant, where the action survives," the plaintiff might suggest the death and proceed with the action. It was argued for the plaintiff that section 135, which was not restricted to actions, the cause of which survived, was quite large enough in its terms to include the case. But the court held that the section was not intended to give any new right of action, but only to prevent the proceedings abating by the death of the plaintiff, and to permit the personal representative to continue them, when he could have brought an action; Mr. Justice CROMPTON saying: "It would be a strange thing to hold that these sections, which

relate merely to matters of procedure, had the effect of doing away with the ancient common-law rule, '*Actio personalis moritur cum persona.*'" *Flinn v. Perkins*, 32 Law J. Q. B. 10, 11; 8 Jur. (N. S.) 1177.

That case does not appear to have ever been overruled or questioned, although it was cited by counsel in *Kramer v. Waymark*, L. R. 1 Exch. 241, 4 Hurl. & C. 427, and again in *Hemming v. Batchelor*, L. R. 10 Exch. 54, 44 Law J. Exch. 54.

In *Kramer v. Waymark*, the point decided was that section 139 of the common-law procedure act, re-enacting the general provision of the statute of 17 Car. II. c. 8, § 1, that the death of either party between verdict and judgment should not be alleged for error, if judgment should be entered within two terms after the verdict, included an action for a personal injury. Such an entry of judgment upon a verdict which has established the rights of the parties is equivalent, in substance and effect, to the ordinary entry of judgment *nunc pro tunc* upon such a verdict, and is quite a different thing from permitting a litigation to be prosecuted by or against an executor or administrator.

In *Hemming v. Batchelor*, on the other hand, where the plaintiff in an action for a personal injury had been nonsuited, with leave to move for a new trial at the next term, and died before that term, the court held that the action abated by the death, and while declining to enter judgment for the defendant on the nonsuit, held that it had no authority to grant a new trial.

In *Green v. Watkins*, 6 Wheat. 260, 262, it was said by Mr. Justice STORY, following Tidd. Pr. 1096, that a writ of error in a personal action would not abate if the plaintiff in error died after assignment of errors. But the case before the court was a real action, in which, as he observed, the right descended to the heir. And there is nothing in Tidd's Practice, or in the authorities there cited, which countenances the theory that a writ of error in an action, the cause of which would not survive, either to heirs or to personal representatives, would not be abated by the death of the only person who could maintain the action. Section 956 of the Revised Statutes, like the statute of 8 & 9 Wm. III., c. 11, § 7, by which the death of one of several plaintiffs or defendants does not abate an action which survives to or against the survivor of them, has been held to extend to writs of error, because, as said by Lord ELLENBOROUGH, and repeated by Chief Justice WAITE: "The proceeding is an action which is commenced by a writ, and the cause of the action is the damage sustained by the parties from the error in the previous judgment, and this damage equally attaches on the survivor in this as in any

other action." *Clark v. Rippon*, 1 Barn. & Ald. 586; *Moses v. Wooster*, 115 U. S. 285; *McKinney v. Carroll*, 12 Pet. 66. Equally applicable to writs of error is section 955 of the Revised Statutes (following section 6 of the statute of Wm. III.), by which, as observed by Chief Justice WAITE, in *Schreiber v. Sharpless*, before cited, "the personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action on account of which the suit is brought survives by law." 110 U. S. 76, 80.

The result is that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed *nunc pro tunc* in his favor. If the judgment below against him should now upon the application of his administrator, be reversed, and the verdict set aside, for error in the instructions to the jury, or, according to the old phrase, a *venire de novo* be awarded, no new trial could be had, because the action has abated by his death. *Hemming v. Batchelor*, above cited; *Bowker v. Evans*, 15 Q. B. Div. 565; *Spalding v. Congdon*, 18 Wend. 543; *Corbett v. Railway Co.*, 114 N. Y. 579; *Harris v. Crenshaw*, 3 Rand. (Va.) 14, 24; *Cummings v. Bird*, 115 Mass. 346.

The necessary conclusion is that, the action having abated by the plaintiff's death, the entry must be writ of error dismissed.

Mr. Justice HARLAN (dissenting).—I cannot agree that this action abates, or that the writ of error should be dismissed, because of the death of the original plaintiff.

In the discussion at the bar of the question whether the action had abated by the death of the plaintiff, ^{Dissenting} reference was made to chapter 103 of the Code of ^{opinion.} West Virginia, giving to the personal representative of one whose death has been caused by the wrongful act, neglect, or default of any person or corporation a right of action for damages against such person or corporation. The right to bring such action is limited to two years, and the damages recovered cannot be subjected to the payment of the debts and liabilities of the decedent, but must be distributed to the parties, and in the proportion provided by law in relation to the personal estate of those who die intestate. In my judgment, those provisions are of no consequence in the present inquiry. This suit was brought by the person alleged to have

been injured, to recover compensation for such injuries as he sustained. It is not claimed that his death, since this writ of error was sued out, was caused by those injuries. And the question is whether this personal action was abated by his death. Its determination, it is agreed, depends upon the law of West Virginia.

By the Code of West Virginia, c. 127, it is provided:

"Sec. 1. Where a party dies, or becomes convicted of felony, or insane, or the powers of a party who is a personal representative or committee cease, if such fact occur after verdict, judgment may be entered as if it had not occurred.

"Sec. 2. Where such fact occurs in any stage of a cause, whether it be in a court of original or appellate jurisdiction, if it occur as to any of several plaintiffs or defendants, the suit may proceed for or against the others, if the cause of suit survive to or against them. If a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract.

"Sec. 3. If, in any case of appeal, writ of error or supersedeas which is now or may hereafter be pending, there be at any time in an appellate court suggested or relied on, in abatement, the death of the party, or any other fact which, if it had occurred after the verdict in an action, would not have prevented judgment being entered as if it had not occurred, the appellate court may, in its discretion, enter judgment or decree in such case as if the said fact had not occurred."

Under the first section above quoted, judgment could be entered without reviving the action, if the party died after verdict. That section is substantially like section 1 of the statute of 17 Car. II. c. 8. The object of the first clause of the second section of chapter 127 of the Code of West Virginia was to dispense with the necessity of reviving an action in which there were several plaintiffs or defendants, one of whom had died pending the action, provided the cause of suit was one which, according to the settled principles of the common law, survived to or against the other parties. This clause had the same object as the sixth and seventh sections of the statute of 8 & 9 Wm. III. c. 11. These English statutes were examined in *Kramer v. Waymark*, L. R. 1 Exch. 241, 243, in which an infant plaintiff sued by next friend to recover damages for injuries sustained through the negligence of the defendant. The child died after verdict, and before judgment was signed. Upon a rule to show cause why the judgment should not be set aside on the ground of the death of the plaintiff before judgment, the court discharged the rule, saying

that the proceedings could not be stayed in face of *Palmer v. Cohen*, 2 Barn. & Adol. 966. In the latter case, which was an action for libel, the plaintiff died after verdict, and before judgment was entered by his executor at the next term. The court refused to set aside the judgment, holding that the death of the plaintiff after verdict did not prevent his executor from entering judgment. In the same case the court referred to the common-law procedure act of 1852, (section 139), which provided that in all actions, personal, real, or mixed, "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict," (St. 15 & 16 Vict. c. 76, § 139), and said that it was stronger than the statute of Car. II., and applied "to all actions, whether they would have survived to an executor or not." See *Gaines v. Conn*, 2 Dana, 232.

The principal difference between the West Virginia statute, before it was amended in 1868, and the statutes of 17 Car. II. and 8 & 9 Wm. III., was that the latter did not apply to real actions,—real, mixed, and personal. The first clause of section 2 of chapter 126 of the West Virginia Code is important in the present discussion, because the words, "if the cause of suit survive to or against" any one of several plaintiffs or defendants, show that, even when that section was adopted, the legislature had in mind the distinction at common law between actions that survived and those that did not survive. And in 1868, with this distinction still in view, the legislature added the second clause of the second section, providing that "if a plaintiff or defendant die pending any action, whether the cause of action would survive at common law or not, the same may be revived and prosecuted to judgment and execution in the same manner as if it were for a cause of action arising out of contract."

If the second clause of section 2 of chapter 127 had never been adopted, an action in tort would not have abated in West Virginia by reason of the death of the plaintiff after verdict, but judgment could have been entered upon the verdict. This, according to *Kramer v. Waymark*, above cited, was the construction placed on the English statute, upon which the first section and the first clause of the second section of chapter 127 of the Code of West Virginia were evidently based. But the second clause of the second section of that chapter was a step in advance. It seems to me clear that the legislature intended by that clause, and under the circumstances stated in it, to permit any action, whatever its nature, and at every stage of it, to be revived and prosecuted to judgment and execution without reference to

the question whether the cause of action would or would not survive at common law. The purpose was to remove from the jurisprudence of West Virginia the distinction existing at common law between causes of action that survived and those that did not survive. Martin sued to recover compensation for the injury alleged to have been done to him through the negligence of the railroad company. This cause of action would not have survived at common law, where death occurred before verdict. But that fact became immaterial under the legislation of 1868, which expressly provided that, whether the cause of action would survive at common law or not, the case could be revived and proceed to judgment precisely as it might do in cases of contracts. The decision now rendered makes the statute mean just what it would mean if it did not contain the words, "whether the cause of action would survive at common law or not." The court holds that an action cannot be revived and prosecuted to judgment and execution if the cause of action be one that would not have survived at common law; and this, notwithstanding the statute, in plain words, says that the inquiry "whether the cause of action would survive at common law or not" is immaterial.

It is said that this conclusion cannot be sustained, with due regard to the decisions of the supreme court of appeals of West Virginia. The case particularly relied on in support of this contention is *Cunningham v. Sayers*, 21 W. Va. 440, 444. There death occurred before the verdict, and the question was whether an action for unlawful entry and detainer abated upon the death of the plaintiff. The court held that the action did not abate, and its decision of that point is expressed in the syllabus. As the constitution of the state makes it the duty of the court "to prepare a syllabus of the points adjudicated in each case," the profession, in that state, look only to the syllabus to ascertain the points in judgment. When, however, we turn to the opinion of the court, nothing, I submit, is found in it justifying the conclusion this court has reached. Referring to the last clause of section 2 of chapter 127 of the Code, the supreme court of appeals of West Virginia said: "It was not the object of the statute to create any new right, and give an action to the heir, devisee, or representative which he had not at common law." No one supposes that that clause gives a personal representative the right of action to sue for personal injuries to the decedent. The personal representative can bring an original action only where death is caused by the wrongful act or default of the defendant. He does not bring an action where one rightfully brought by the decedent is revived in his name as personal representative. But the supreme court of appeals of West Virginia

proceeds: "But where the representative, heir, etc., had a right, by suit, to accomplish the same object, substantially, as the ancestor had in view in bringing the suit, that for convenience it should not abate on the ancestor's death, but might be revived." Even this principle, the statement of which was not at all necessary to the decision, is sufficient to embrace the present case; for, as the suit of Martin was to recover compensation for the injuries he received, a revivor of it, in the name of his personal representative, and its prosecution to judgment and execution, would accomplish substantially the same object the decedent had in view, namely, to compel the railroad company to pay for the injury inflicted upon him as the result of its negligence.

Another case referred to in support of the contention that the action abated by the death of the plaintiff is *Curry v. Mannington*, 23 W. Va. 14. But that case did not involve any question in reference to the revivor of an action for personal injuries received by the plaintiff. It was a suit against a municipal corporation for injuries alleged to have been received through the neglect of the defendant to keep its streets and walks in repair. It is true that the court, in that case, said: "In the cases, however, of injuries to the person, and not to the property or estate, of the decedent, whether by assault, battery, false imprisonment, slander, negligence, or otherwise, if either the party who received or he who committed the injury die, the maxim applies rigidly, and no action can be supported by or against his representative. 3 Bl. Comm. 302. In this state the only exception to this rule, so far as I have been able to discover, is the provision of our statute embracing what is known as 'Lord Campbell's Act,' giving a right of action to the representative against any party wrongfully causing the death of his decedent. Code, p. 545, c. 103, §§ 5, 6." But it is plain from the context that this language had reference to the meaning of a particular statute of limitations of personal actions, that used the words, "if they be for matters of a nature that in case of the death of the party, they could not be brought by or against his representative." In effect, the court was considering the question as to whether a personal representative could bring an original action for personal injury received by his decedent. That is an entirely different question from the one here presented, which is whether an action for the recovery of money, duly brought by the person injured, could, upon his death, be revived in the name of his personal representative, and be prosecuted by the latter to judgment and execution. There is not a hint, much less a distinct statement, either in the syllabus or in the

opinion in *Curry v. Mannington*, in respect to any such question.

Suppose Martin had obtained a judgment for \$10,000 in damages, and had died after the case was brought here by the railroad company. Could it not have been revived in this court against his personal representative? And if this court had reversed such a judgment, and remanded the cause for a new trial, could the railroad company have prevented another trial in the court below by the suggestion of record that, pending the writ of error in this court, the plaintiff had died? In my opinion, this question should be answered in the negative if any effect whatever is given to the local statute. A different rule should not be applied when the case is here upon writ of error sued by the plaintiff.

Reference has been made to the case of *Flinn v. Perkins*, 32 Law J. Q. B. 10, 11, 8 Jur. (N. S.), 1177. That was an action to recover damages for a personal injury. The plaintiff died before verdict, and the effort was to have it revived in the name of the personal representative. It was held that the common-law procedure act did not permit the revivor under such circumstances. But that case differs from this in two important particulars: (1) There was a verdict and judgment in this case before the plaintiff died; (2) there was no provision in the English statute, as there is in the West Virginia Code, giving the right of revivor, where the plaintiff or defendant dies pending the action, "whether the cause of action would survive at common law or not."

But, if I am wroug in my interpretation of the Code of West Virginia, there is still another view of this question which, in my judgment, is important. Martin's death occurred after the assignment of errors was filed and made part of the record. In Tidd. Pr. 1163, it is said: "A writ of error may abate by the act of God, the act of law, or the act of the party. If the plaintiff in error die before errors assigned, the writ abates, and the defendant in error may thereupon sue out a *scire facias quare executionem non* to recover the judgment against the executors or administrators of the plaintiff in error. But, if the plaintiff in error die after errors assigned, it does not abate the writ. In such case the defendant, having joined in error, may proceed to get the judgment affirmed, if not erroneous, but must then revive it against the executors or administrators of the plaintiff in error." And so it was adjudged by this court in *Green v. Watkins*, 6 Wheat. 260, 262, in which Mr. Justice STORY, speaking for the court, and after referring to the rules that controlled the question of abatement, whether in real or personal actions, where the party died before judgment, said: "But in cases of writs of error upon judgments

already rendered a different rule prevails. In personal actions, if the plaintiff in error dies before assignment of error, it is said that by the course of proceedings at common law the writ abates ; but if after assignment of errors, it is otherwise." These authorities, I submit, indicate that the writ of error should not be dismissed after there has been an assignment of errors.

Being of opinion that the action has not abated by the death of the plaintiff, I am unable to concur in the opinion and judgment of the court.

Jurisdiction of United States Courts—Citizenship of Railroad Companies.—See *Pittsburgh, Cincinnati & St. Louis R. Co. v. Baltimore & O. R. Co.*, *ante*, p. 574, and note, 584.

PITTSBURGH, CINCINNATI & ST. LOUIS R. CO.

v.

KEOKUK & HAMILTON BRIDGE CO.

(155 *United States*, 156.)

Contract between Railroad Companies as to Agreement with Bridge Company, making the Contract by Reference thereto a part of a Lease—Effect of Termination of Lease by Eviction.—By a contract between a corporation and railroad companies, whose lines, together with a railroad bridge to be constructed, would form a continuous line of transportation, the former agreed to construct and maintain the bridge, and the latter agreed to pay certain tolls for such use. One of the railroad companies entered into this contract on behalf of itself and two of the other companies who assumed all liabilities and obligations, and became entitled to all benefits, as if the same had been substantially named and made a part of a lease theretofore entered into by the contracting company and such two other companies, by which lease the lessee companies were to assume and carry out certain contracts of transportation over the lines of still other companies. *Held*, that the contract for the bridge tolls was so independent of the lease that it would not be affected, nor the contracting companies released from liability thereunder by the termination of the lease by eviction or otherwise.

CERTIFICATE from the United States circuit court of appeals from the seventh circuit.

This was a bill in equity, filed in the circuit court of the United States for the northern district of Illinois by the Keokuk & Hamilton Bridge Company (hereinafter called the "Bridge Company") against the Pittsburgh, Cincinnati & St. Louis Railway Company (hereinafter called the "Pittsburgh Company") and the Pennsylvania Railroad Company, to recover deficiencies in tolls for the use

Case stated.

of the plaintiff's bridge since March 1, 1883, under a contract, dated January 19, 1869, and modified June 6, 1871, by the Bridge Company with the Columbus, Chicago & Indiana Central Railway Company (hereinafter called the Indiana Central Company) and three other railroad corporations, by which the Bridge Company agreed to build and maintain a railway bridge across the Mississippi river, and granted to these four railroad companies in perpetuity the right to use it for the passage of their trains; and they agreed to pay monthly certain tolls, and, if those should fall below a certain sum, each to pay one fourth of the deficiency.

This contract was executed by the Indiana Central Company upon the requests in writing of the presidents of the Pittsburgh Company and of the Pennsylvania Company, by which these two companies agreed to "assume all the liabilities and obligations, and be entitled to all the benefits, of said bridge contract, the same as if it had been specifically named and made a part of the ninth article of" a lease of the Indiana Central Company to and with the Pittsburgh Company and the Pennsylvania Company, dated January 22, 1869.

By that lease, the Indiana Central Company leased its railroad to the Pittsburgh Company for 99 years; the Pittsburgh Company covenanted to pay a certain proportion of the earnings of that road to the Indiana Central Company, and, by the ninth article, to assume and carry out, receiving and enjoying the benefits thereof, certain existing contracts for transportation over railroads of other companies not mentioned above; and the Pennsylvania Company guarantied the performance of the covenants of the Pittsburgh Company.

The bridge aforesaid, with the railroads of the Pennsylvania Company, the Pittsburgh Company, the Indiana Central Company, and other railroad companies named in the bridge contract, formed a continuous line of railroad transportation from Philadelphia to Des Moines.

The provisions of the bridge contract and of the lease, and the circumstances attending and following their execution, are more fully set forth in the case between the same parties in 131 U. S. 371, 39 Am. & Eng. R. Cas. 213; but the above abstract is sufficient for the purposes of the present case.

In June, 1871, immediately after the modification of the bridge contract, the bridge was accepted by the Bridge Company and was opened for use, and thenceforward was used by the Pittsburgh and Pennsylvania Companies in the exercise of the control asserted by them under the contract and lease aforesaid. The Bridge Company demanded payment directly from the Pittsburgh Company, semi-annually, of the sums payable by the Indiana Central Company for tolls and deficien-

cies under the modified bridge contract; and from June, 1871, to September, 1874, the Pittsburgh Company paid to the Bridge Company the amount both of such tolls and of such deficiencies. After that time, like payments were demanded by the Bridge Company of the Pittsburgh Company, and the tolls, only, paid.

On July 25, 1881, the Bridge Company filed a bill in equity against the Pittsburgh Company and the Pennsylvania Company to recover deficiencies in tolls for the use of the bridge from September 1, 1874.

To that bill the defendants answered that the Indiana Central Company, the Pittsburgh Company, and the Pennsylvania Company never authorized their officers to execute the bridge contract, or to bind them by it, and that the contract was beyond the scope of their corporate powers.

The Pittsburgh Company also, by way of supplemental answer, set up that in 1875 the trustees named in a mortgage made by the Indiana Central Company of its railroad, rights, and franchises, before the execution of the bridge contract, brought a bill in equity to foreclose that mortgage, and were thereupon appointed receivers, and, pursuant to decrees of foreclosure there were conveyed by the Indiana Central Company to the receivers, and by them on January 10, 1883, sold and conveyed to three individuals, as trustees, for a smaller sum than the debt secured by the mortgage, its road, rights, and franchises, with the right to affirm or disaffirm the lease aforesaid, and the purchasers, on February 21, 1883, notified the Pittsburgh Company that they disaffirmed the lease; and further averred "that, in accordance with said decrees, possession of said railway property, rights, and franchises has been surrendered to the said purchasers, and that it has been wholly ousted and evicted from all and singular the premises, rights, and franchises leased to it as aforesaid, and it relies upon the cancellation of said lease and the ouster and eviction, as aforesaid, as a full and perfect answer to the relief sought in the bill."

To those answers a general replication was filed, and the case was referred to a master, who reported that there was due from the Pittsburgh and Pennsylvania Companies to the Bridge Company, as one fourth part of the deficiency in the receipts of the Bridge Company from September 1, 1874, to March 1, 1883, the sum of \$118,076.89; and that the road, rights, and franchises of the Indiana Central Company had been sold and conveyed, as alleged in the supplemental answer of the Pittsburgh Company, to trustees, and by them on March 17, 1883, to the Chicago, St. Louis & Pittsburgh Railroad Company. The circuit court confirmed the master's re-

port, and entered a decree for the Bridge Company for the sum found due; and, on appeals by the Pittsburgh Company and the Pennsylvania Company, that decree was affirmed by this court. 131 U. S. 371, 39 Am. & Eng. R. Cas. 213.

The present bill was filed September 12, 1889, and set forth the proceedings and decree in the former suit. In an amended answer to this bill, the Pittsburgh Company and the Pennsylvania Company set up that the interlocutory decrees in the suit for foreclosure, appointing the receivers and directing a conveyance to them, were subject to the qualification that until further order of the court the receivers should not disturb the possession of the Pittsburgh Company; and that no order was made that they should disturb its possession, until and unless by the decrees of sale; but that, on the contrary, the Pittsburgh Company remained in undisturbed possession of the railroad property of the Indiana Central Company until March, 17, 1883, when it was wholly dispossessed of the same and evicted therefrom, and from all rights under the lease, by the Chicago, St. Louis & Pittsburgh Railroad Company, to which the same had been conveyed by the purchasers under the decree of foreclosure, "by virtue of which eviction the said Pittsburgh Company and the Pennsylvania Company lost and ceased to have any right, title, or interest to, or any claim or demand upon, said railway premises, property, and franchises, in or under said lease or amended lease, and became relieved thereby from all obligations, duties, and liabilities imposed by the ninth clause of said lease, and by the said requests, or either of them, and by the said original bridge contract, or any amendment or modification thereof." To this answer the plaintiff filed a general replication.

The circuit court entered a decree for the plaintiff, and the defendants appealed to the circuit court of appeals for the seventh circuit, which certified to this court, under the act of March 3, 1891, c. 517, § 6, that at the hearing "there arose upon the pleadings in the cause certain propositions of law, concerning which the instruction of the supreme court of the United States is desired. And because this court is in doubt whether, in view of the decision of the supreme court of the United States in the cause between the parties hereto, referred to in the pleadings, and reported in 131 U. S. 371, 139 Am. & Eng. R. Cas. 213, it is at liberty to consider or sustain the eviction pleaded in this case as a valid defense to the claim of the appellee, and whether the contracts with the Bridge Company could be avoided by any transaction with respect to the lease, it is therefore ordered that the pleadings in this case, to wit, the bill, the amended answer, and the replication,

be certified to the supreme court of the United States for its opinion and instruction upon the following questions:

"(1) Is this court at liberty, in view of the decision and decree in the former case between these parties, referred to in the pleadings, to consider or sustain the defense of eviction pleaded in this case?"

"(2) Are the contracts between the Bridge Company and the appellants so independent of the lease that they would not be affected, nor the defendant railway companies released from liability thereunder, by termination of the lease by eviction or otherwise?"

George Hoadly, for Pittsburgh, C. & St. L. Ry. Co., and others.

Edwin Walker, Lyman Trumbull, and Perry Trumbull, for Keokuk & H. Bridge Co.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

In the former case between these parties, reported 131 U. S. 371, 9 Sup. Ct. 770, it was decided that the Pittsburgh and Pennsylvania Companies were the real, though not the formal, parties to the bridge contract executed by the Indiana Central Company at their request and for their benefit; that this contract was within the scope of their corporate powers, and made them directly liable to the Bridge Company for the proportion of tolls and deficiencies which by the terms of that contract were chargeable to the Indiana Central Company; that the bridge contract was a separate and distinct agreement from the lease (to which the Bridge Company was not a party) between the Indiana Central Company and the Pittsburgh and Pennsylvania Companies; and that the validity and effect of the bridge contract did not depend upon the validity or invalidity of the lease, or upon the question whether these two companies, by reason of eviction, were no longer liable upon the lease.

Effect on contract for tolls of termination of lease.

In that case, this court, after discussing the terms of the lease, of the bridge contract, and of the agreement contained in the request of the Pittsburgh and Pennsylvania Companies to the Indiana Central Company to execute that contract, said:

"The reference in that request and agreement to the ninth article of the lease was for the purpose of defining the extent of the liabilities and benefits assumed, and perhaps of indicating that the Pittsburgh Company alone was bound as principal, and the Pennsylvania Company as guarantor only; but it did not make the bridge contract a part of the lease."

"The sole ground of our decision is that the bridge contract is independent of the lease, and is valid and binding as between the parties to this suit, whether the lease is valid or invalid. This being so, the question argued at the bar, whether the appellants, by reason of eviction, are no longer liable on the lease, becomes immaterial." 131 U. S. 387, 390.

The reason and principle of that decision, so far as concerns the present inquiry, were that, while the ninth article of the lease might be referred to for the purpose of defining the extent or measure, and perhaps the nature or character, of the liabilities and benefits which the Pittsburgh and Pennsylvania Companies assumed by reason of the terms of the bridge contract, and of the agreement contained in their request for its execution, yet the bridge contract was not made part of the lease, nor was the whole lease made part of the bridge contract, or of the agreement expressed in the request, nor did the liability of the Pittsburgh and Pennsylvania Companies to the Bridge Company upon the bridge contract, for deficiencies in tolls upon the bridge, depend upon the question whether the lease of the road of the Indiana Central Company to the Pittsburgh Company was valid or invalid, or upon the question whether that lease remained in full force between the parties to it, or had been terminated by eviction of the lessee or otherwise.

The same reason and principle are no less applicable to the eviction as now pleaded than to the eviction as pleaded in the former suit.

Consequently, the second question certified by the circuit court of appeals must be answered in the affirmative; and no further solution of the doubts expressed by that court in the first question, and in the preamble thereof, is necessary to the disposition of the case.

Ordered accordingly.

Mr. Chief Justice FULLER, having been of counsel, did not sit in this case, or take any part in its decision.

Contracts between Railroad Companies.—See note, 9 Am. & Eng. R. Cas. 383.

Contract between Railroad Company and Warehousemen as to Delivery of Grain at Elevators—Construction.—In *Dunlap v. Chicago, M. & St. P. R. Co.*, 151 Ill. 409, an agreement between a railroad company and warehousemen, which was embodied in a lease by the company to the warehousemen, provided that the latter should construct grain elevators, and the railroad company agreed that "the total amount of grain received at said elevators should be at least 5,000,000 bushels on an average for each year during the term of the lease," and it was held that when there should be delivered on its track, at the elevators, by the railway company and other parties, grain in quantity amounting to 5,000,000 bushels annually, the covenant made by the company was fully complied with, and whether

the warehousemen received the grain in store or declined to take it in store on account of want of capacity or other cause, did not in any manner affect the railroad company nor impose any liability upon it.

Requisites to Sustain Action on such Contract.—In *Dunlap v. Chicago, M. & St. P. R. Co.*, 151 Ill. 409, which was an action by warehousemen for breach of an agreement by a railroad company which was embodied in a lease made by the company to plaintiffs, and which provided that the total amount of grain received at elevators to be constructed by the warehousemen should be at least 5,000,000 bushels on an average for each year during the term, it was held that it was incumbent upon the plaintiffs to aver that they were ready, able, and willing to accept and store all grain delivered at the elevators for storage, and that a less quantity was delivered, or offered to be delivered, than was required by the agreement. The court said: "The promise that a certain quantity of grain should be delivered and the promise that it should be accepted and stored, are dependent undertakings. The obligation that the grain should be delivered and the obligation to store are concurrent. *Hough v. Rawson*, 17 Ill. 591; 1 Chit. Pl. 297; *Porter v. Rose*, 12 Johns. 209."

TEMPLE STREET CABLE R. CO.

v.

HELLMAN *et al.*

(103 California 634.)

Agreement between Street Railway Company and Proprietor of Baseball Grounds—Breach by Proprietor—Measure of Recovery.—For the purpose of increasing its traffic a street railway company, in consideration of an agreement by the proprietor of an existing baseball park to discontinue the same, to establish a new park adjacent to the line of the railway, and to procure a certain number of games or other equivalent entertainments to take place thereon in each year, executed its promissory note and took from such proprietor a bond with sureties, conditioned for the faithful performance by him of such contract, and, providing that in case of the violation of any of its stipulations, the railway company would be saved harmless on account of the note. *Held*, in an action on the bond, that whatever the railway company had received as the result of a partial performance of the contract might be set off as against the amount due on the note.

Same—Ultra Vires.—The note, being given for the purpose of increasing the legitimate business of the railway company, was not *ultra vires*.

Actions for Breach—Sufficiency of Evidence to Warrant Finding of Execution of Note by Company—Burden of Proof as to Authority of Officers to Execute Note.—Admissions on the part of the obligor and the sureties in a subsequent contract of indemnity executed by them were sufficient to warrant a finding of the due execution of the note, and to place the burden upon them to show want of authority on the part of the officers of the corporation to execute it.

Non-payment of Note Given by Company as Affecting its Right to Recover for Breach of Contract.—The fact that the note, which was in the hands of a third person, had not been paid by the railway company at the time the action on the bond was commenced would not affect the right of the

company to recover where there was an express agreement that the action might be immediately commenced upon the non-performance of the agreement, irrespective of the payment or maturity of the note.

APPEAL to Los Angeles county superior court.

Graff & Latham, for appellants.

Chapman & Hendrick, for respondent.

BEATTY, C.J.—On May 5, 1890, the plaintiff was a corporation owning and engaged in operating a street railway at Los Angeles, and the defendant Marco Hellman was conducting a

baseball park on First street, in that city. For the purpose of increasing the traffic on its road, the plaintiff, at the date mentioned, executed to Hellman its negotiable promissory note for \$5500, payable in two years, with interest at the rate of 10 per cent per annum, which he transferred to a third party, who, at the commencement of this action, was the owner and holder thereof.

In consideration of the receipt of this note, Hellman on his part agreed, among other things, to discontinue the playing of baseball at the First-street grounds, and within 60 days to establish, and for two years thereafter to maintain, a first-class baseball park on a tract of land adjacent to plaintiff's line, of which he had become the lessee. He further agreed to give at the new grounds not less than 104 games of baseball or other equivalent entertainment each year, to provide suitable accommodations for the public, and to pay over to the plaintiff monthly 10 per cent of the gross receipts for admissions.

The other defendants, in order to induce the plaintiff to enter into this contract and to execute its said promissory note to Hellman, became his sureties on a bond in the penal sum of \$7000, conditioned for the faithful performance by him of the principal contract, or, in case of the violation of any of its stipulations, to save the plaintiff harmless on account of its promissory note.

Hellman having failed to complete his preparations to open the new grounds within 60 days, he and his sureties, on July 5th, obtained an extension of time until August 1st, and on the 2d of August they obtained a further extension of time until October 1st. Both of these extension agreements were in writing, and contained various stipulations in regard to continuing the games at the First-street grounds, division of the gate receipts, indemnity to plaintiff for loss of fares, and other matters not requiring special notice.

In addition to these things, Hellman and his sureties, at the time of obtaining the second extension, executed a new contract of indemnity to the plaintiff, which, after referring

to and reciting the more material portions of the various contracts, etc., above mentioned, contains, among others, the following stipulation: "That in case said Marco Hellman fails to perform any of the agreements mentioned in the said contract of May 5, 1890, as modified by the agreement of extension of July 5, 1890, and this agreement, or fails to perform any of the covenants on his part contained in the agreement of July 5, 1890, or this agreement, at the time in said contract or in said agreements mentioned, they will pay the amount of the note mentioned in the said contract and the interest therein provided, and said company shall have the right to immediately begin suit against said Marco Hellman and the sureties on said bond to recover the amount of the said note and the interest therein provided. This provision shall not be construed a waiver of any other right of action which the said company may have for breach of said contract of agreement."

Hellman never complied with his agreements, but, after giving only about a dozen entertainments, abandoned the enterprise, and forfeited his lease.

Thereupon, on September 2, 1891, and before the plaintiff's note had been paid or was due, this action was commenced against Hellman and his sureties.

Plaintiff recovered a judgment for \$6737.50, from which, as well as from an order overruling their motion for a new trial, the defendants appeal.

Much of the argument on the part of appellants is devoted to a discussion of the nature of the action—a point which does not seem to us to present any serious difficulty. Assuming that the plaintiff had the power to enter into this particular contract, and that its note was duly executed, it had two remedies for a breach of the principal contract by Marco Hellman—it could either sue him for the profit it would have made by performance of his agreement, or it could sue him and his sureties on the second contract of indemnity for the amount of its promissory note for \$5500 and interest. Having this choice of remedies, the plaintiff elected to pursue the latter, and its complaint is entirely sufficient to entitle it to the relief sought.

All the facts above detailed are fully set out, along with other formal allegations showing the right of the plaintiff to recover from Hellman and his sureties the amount of plaintiff's note, the proceeds of which he had received and which it had bound itself to pay. But the appellants contend that to allow the plaintiff to recover the full amount of its note and interest, after a partial performance by Hellman of his contract, and receipt by plaintiff of some of the profit and ad-

Benefits from
partial pre-
formance of
contract.

vantage of performance on his part, is unjust and unfair, and is the enforcement of a penalty or an award of liquidated damages in a case where a stipulation for liquidated damages is unlawful. They say that, upon the same theory that allows a recovery of the full amount of the note and interest after a few games had been played at the new grounds, and receipt by plaintiff of the increased fares on its road caused by the giving of such games, the like amount must have been recovered if all but the last one of the 208 games had been given, and the plaintiff had actually received a large profit from the giving of such games.

In the view we entertain of the rights of the parties under the contract, this argument has no force. Whatever the plaintiff received as the result of Hellman's partial performance he and his sureties have a right to set off against the amount of the note and interest. The plaintiff, not being able or willing to prove the profits it would have made by performance on the part of Hellman, elects to resort to the bond of indemnity on account of its note. It is clearly entitled to that indemnity in full, but it is entitled to nothing more. If it has received anything from Hellman, much or little, defendants are entitled to a corresponding deduction from the full amount of the liability assumed. But it is for them to allege and prove the amount so received. If this view is correct—and we are satisfied it is—the case is relieved of all the difficulty suggested in the argument of counsel.

It follows, however, from this view, that the judgment of the superior court is for too large a sum. The utmost amount which the plaintiff could in any case have recovered in this form of action is \$6600; i.e., \$5500 principal, and two years' interest thereon, at 10 per cent, amounting to \$1100. The superior court seems to have added to these sums \$137.50, or a quarter's interest, which is found to have been paid by the plaintiff on the note. But this quarter's interest is a part of the \$1100, and cannot be added to it. It also appears that plaintiff received from Hellman, at different times, sums amounting to \$207.50, which should be deducted from the full amount of the \$6600. The amount of any increased fares that may have been received by plaintiff in consequence of the playing of a few games at the new grounds does not appear. This disposes of the principal questions discussed in the argument, but there remains to be noticed a few minor objections.

The giving of its note by plaintiff was not *ultra vires*. The object was to increase its legitimate business, and the case, as to this point, is within the principle of the decisions in *Vandall v. Dock Co.*, 40 Cal. 83, and *Zienwaldt v. Railroad Co.*, 1 Pac. Coast Law J. 123.

Ultra vires.

The admissions of the defendants in the contracts executed by them were sufficient evidence *prima facie* to warrant the superior court in finding that the note of the plaintiff was duly executed, and renders harmless the error, if error it was, in overruling defendant's objection to the testimony of the witness Wood. After their repeated admissions of the execution of the note, the burden was on the defendants to show want of authority on the part of the officers of the corporation to execute it.

Admission in contract of indemnity.

Burden of proof.

It is no objection to the right of plaintiff to recover that it had not paid its note before this action was commenced. The defendants expressly agreed that the action might be immediately commenced upon the failure of Hellman to perform any of his agreements, irrespective of the payment or maturity of the note.

Non-payment of note.

In accordance with the foregoing views it is necessary to reverse the judgment, for the error of the superior court in awarding too large an amount, but it does not seem to be necessary to order a new trial.

The judgment is reversed, and the cause remanded, with directions to the superior court to modify its judgment as follows: The plaintiff should have judgment for \$6600, less \$207.50—i.e., for \$6392.50—with legal interest thereon from May 5, 1892, the date of the maturity of plaintiff's note, and costs in the superior court.

We concur: MCFARLAND, J.; FITZGERALD, J.; GAROUTTE, J.; HARRISON, J.; DE HAVEN, J.

Authority of Railroad Company to Subscribe Funds to Public Object.—See *Tomkinson v. Southeastern R. Co.* (Eng.), 30 Am. & Eng. R. Cas. 517, and note, 521.

Ultra Vires Contracts.—See *Oregonian R. Co. v. Oregon R. & N. Co.* (C. C.), 20 Am. & Eng. R. Cas. 518, and note, 537.

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v.

DODGE CITY, MONTEZUMA & TRINIDAD R. Co.

(*Kansas Supreme Court, May 5th, 1894.*)

Burden of Charter Obligations on Road-bed and Superstructure of Railroad in Possession of Successors to Company—Diversion from Original Purposes of Incorporation.—The road-bed and superstructure of a railroad built under a charter obtained in accordance with the laws of the state are

charged, not only in the hands of the original corporation, but of purchasers as well, with the burden of the company's charter obligations, and cannot be diverted from the purpose to which it was devoted, nor relieved from this burden, without the consent of the state, duly expressed by the legislature or other competent authority.

ERROR to district court, Gray county.

Milton Brown and J. B. Naylor, for plaintiff in error.

Sutton & McGarry, for defendants in error.

ALLEN, J.—This action was instituted by the county attorney of Gray county, in the name of the state, to restrain the defendant from tearing up and removing the track, ties, and iron from that part of the road-bed of the Dodge City, Montezuma & Trinidad Railroad in Gray county. A restraining order was granted by the district judge, to continue in force until December 22, 1893, which time was fixed for hearing the application for a temporary injunction. A hearing was had at that time, and the temporary injunction was denied. The plaintiff brings the case here for review.

While the title to a completed railroad is vested in the corporation, it is only private property in a qualified sense.

Railroads, like all other public thoroughfares, are public instrumentalities. The power to construct and maintain railroads is granted to corporations for a public purpose. The right to exercise the very high attributes of sovereignty, the power of eminent domain, and of taxation to further the construction of railways could not be granted to aid a purely private enterprise. The railway corporation takes its franchises subject to the burden of a duty to the public to carry out the purposes of the charter. The road, when constructed, becomes a public instrumentality, and the road-bed, superstructure, and other permanent property of the corporation are devoted to the public use. From this use neither the corporation itself, nor any person, company, or corporation deriving its title by purchase, either at voluntary or judicial sale, can divert it without the assent of the state. It matters not whether the enterprise, as an investment, be profitable or unprofitable. The property may not be destroyed without the sanction of that authority which brought it into existence. Without legislative sanction railroads could not be constructed. When once constructed, they may only be destroyed with the sanction of the state. The legislature unquestionably has the power to authorize the abandonment of railways when they cease to be of public utility. It may be, also, that in an action prosecuted by the attorney-general, on behalf of the state to forfeit the charter and wind up the affairs of a railroad corporation for any

proper cause, the court might make all necessary orders for the disposition of the property of the company; but in this case the state appeared by the county attorney of the county in which the road was located, protesting against the removal of the superstructure of the road. The court erred in refusing the injunction asked.

The general propositions stated above are abundantly supported by authority. *Railroad Co. v. Casey*, 26 Pa. St. 287; *State v. Sioux City & P. R. Co.*, 7 Neb. 357; *People v. Louisville & N. R. Co.*, 120 Ill. 48; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269; *Peoria & R. I. Ry. Co. v. Coal Valley Min. Co.*, 68 Ill. 489; *Gates v. Railroad Co.*, 53 Conn. 333, 24 Am. & Eng. R. Cas. 143; *Thomas v. Railroad Co.*, 101 U. S. 71; *Railroad Co. v. Winans*, 17 How. 30; *Pierce v. Emery*, 32 N. H. 484; *People v. New York, etc., R. Co.*, 28 Hun, 543. These views are also in accordance with prior decisions of this court. *Commissioners v. Miller*, 7 Kan. 479; *Railroad Co. v. Ryan*, 11 Kan. 603; *State v. Lawrence Bridge Co.*, 22 Kan. 438; *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 56 Am. & Eng. R. Cas. 549.

We have decided this case on what appears in the record, without reference to facts developed on the hearing of other cases relating to the same railroad company which may deprive the plaintiff of any substantial benefit from the decision in this case.

The order of the district court refusing the temporary injunction is reversed.

All the justices concurring.

Charter Powers of Corporations.—See *McCalmont v. Philadelphia & Reading R. Co.* (C. C.), 3 Am. & Eng. R. Cas. 163, and note, 175; *Davis v. Old Colony R. Co.*, *Id.* 543, and note, 564.

Liability of Corporation Formed by Consolidation for Obligations of Constituent Companies.—In *Berry v. Kansas City, Ft. S. & M. R. Co.* (Kan., May 5, 1894), 36 Pac. Rep. 724, it was held that where one or more corporations are consolidated into a new corporation with a new name, and the old corporations go entirely out of existence, if no arrangements are made respecting the property and liabilities of the corporations that cease to exist, concerning the debts and obligations of such corporations, the consolidated or new corporation will be answerable for the liabilities of its constituent companies. In such a case the new corporation succeeds to all the property of the old corporations, and the debts of the old corporations become by implication the obligations of the new corporation. The court said: "All of the authorities seem to agree that, 'unless the statute or articles of consolidation make express provision therefor, the new corporation assumes all the liabilities of the old ones, at least in equity, to the extent of the property received by it from the old corporation.'" 3 Woods, Ry. Law, § 486; *Brum v. Insurance Co.*, 16 Fed. Rep. 140; *Railway Co. v. Ham*, 114 U. S. 587, 26 Am. & Eng. R. Cas. 66. The foundation of the liability of a consolidated corporation may rest on a statute or on an agreement, either expressed or implied. If the statute does not provide that

the new company shall assume the debts and liabilities of the constituent companies, and there is no express agreement respecting the same, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corporation. *Railroad Co. v. Powell*, 40 Ind. 37; *Railroad Co. v. Hendricks*, 41 Ind. 48; *Railway Co. v. Boney*, 117 Ind. 501, 39 Am. & Eng. R. Cas. 168; *Railroad Co. v. Shirley*, 54 Tex. 125, 4 Am. & Eng. R. Cas. 443."

Reorganization of Railroad Company—*Right of Receiver to Aid in Scheme.*—In *Clarke v. Central R. & B. Co.*; *Central R. & B. Co. v. Farmers' Loan & Trust Co.*; and *Brown v. Same* (U. S. Cir. Ct., E. D. Ga., S. D., June 30, 1893), 66 Fed. Rep. 16, it was held that there is no impropriety in a receiver advising, aiding, and encouraging a reorganization scheme which offers the prospect of securing the largest measure of protection to the affairs and interests connected with or concerned in the property and assets in the custody of the court, and in the possession of such receiver for administration and distribution. The court said: "What the court intended to say at Atlanta, and what it means to say here and now, is that its receiver, as an officer of the court, should not become a partisan in favor of any particular interests or classes; that he should not so administer his trust as to represent and promote, either in his dealings with the property or in schemes of reorganization, one interest at the expense or to the prejudice of other interests equally entitled to the consideration and protection of the court and its officers; that it was the duty of the receiver, as it was the duty of the court, to act impartially as between all interests. While this is his duty, it is right and proper, and the circuit justice has instructed the receiver (as he wishes the counsel to know), that he may with propriety and in the line of his duty endeavor to bring together the various conflicting interests here involved on some equitable basis or plan that will protect the properties and assets of the Central Railroad from wreck and ruin, and, as far as possible, save the debenture holders, general creditors, and stockholders from loss, or reduce their loss to the lowest minimum; that he could by advice and suggestions aid and encourage a reorganization scheme or schemes which would bring together the interests represented by the Farmers' Loan & Trust Company, the Central Trust Company, the Terminal Company, Hollins & Co., Drexel, Morgan & Co., the Southwestern Railroad Company, the Augusta & Savannah Railroad Company, and any and all other interested parties, including the Central Railroad, and hold out the prospect of affording the largest measure of security and protection to all concerned, and according to their respective rights, but that in doing this his action or actions should be impartial as between all interests."

Duty of Court and Receiver not to Coerce or Control Action of Persons Interested.—In *Platt v. Philadelphia & R. R. Co.* (U. S. Cir. Ct., E. D. Pa., Oct. 20, 1894), 65 Fed. Rep. 872, it was held that the question of the wisdom and expediency of adopting a scheme of reorganization by persons interested in railway property is for their solution and determination, and that no attempt should be made either by the court or by its receivers to coerce their judgment or control their action.

In this case the court approved the petition of the receivers for authority to enter into an agreement for the partial readjustment of the affairs of a railroad company and an iron company, it appearing that the proposed action of the receivers would impose no constraint upon the persons interested, but would leave those who had the right to accept or reject the plan referred to wholly free to do the one or the other as they might see fit. The court said: "The question of the wisdom and expediency of adopting any such scheme is for solution and determination by the persons interested, and no attempt to coerce their judgment or control their action should be made, either by the court or the receivers. But nothing of that

sort is involved in the authority now asked and given. It imposes no constraint, but leaves those who have the right to accept or to reject the plan referred to, wholly free to do the one or the other, as they may see fit. It sanctions the raising of money by rightful means, upon reasonable terms, and for proper objects; and it is not a valid ground of objection to it that it also renders feasible, in case of its due acceptance, the only reorganization project which is known to exist. The receivers should not enlist, on either side, in conflicts among those interested in the property they have in charge, but the neutrality which it is their duty to observe is not departed from by facilitating any plan which may be proposed for the general benefit, provided that to all alike, and with regard to every plan advanced in good faith, the same facilities be indifferently accorded; and the court, while it will not pass upon the comparative merits of rival schemes of reorganization, will regard with satisfaction any and every legitimate effort to terminate this receivership. It has now continued for nearly two years, and it will not be allowed to continue indefinitely. The appointment of receivers is an extraordinary remedy, and should be a temporary one. It is a beneficent one in many cases, but any unnecessary and futile protraction of the period of legal custody is, in any case, a grave abuse and a great evil. This is not said with reference to any particular plan of reorganization, but because I deem the present occasion a proper one for making it distinctly understood that if the parties in interest do not, within a reasonable time, devise some means for ending this receivership, the court will seriously consider whether it should not be dissolved."

Authorization by Court of Commission to Syndicate advancing Moneys in Furtherance of Readjustment Scheme.—In *Platt v. Philadelphia & R. R. Co.* (U. S. Cir. Ct., E. D. Pa., Oct. 20, 1894), 65 Fed. Rep. 872, the court considered it fair to allow receivers to pay out of the railroad property in its hands 2½ per cent commission on moneys to be advanced by a syndicate for the purpose of carrying out a scheme of readjustment, provided that the scheme should become effective, it appearing that the money so to be advanced was for the purchase of overdue coupons and claims for interest.

When Mandamus will Issue to Compel Railroad Company to Replace or Repair its Track.—In *State ex rel. Little v. Dodge City, M. & T. R. Co.*, 53 Kan. 329, it was held, that where a railway company, owning a short line of railroad of 26 miles only, is wholly insolvent, and has no cars or engines with which to operate it, and no funds or property to be applied for the payment of the expenses of the company or the road, and the use of the road has been abandoned for several months, and the road cannot be operated, except at a great loss, by any corporation or person, not taking into account the repairs of the road and the taxes thereon, the supreme court, having some discretion in the granting of a writ of mandamus, will not compel, by a peremptory writ, the railway company to replace or put into repair its track, a part of which has been torn up, as such an order would be useless or futile, and of no public benefit. *Citing* *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 20 Am. & Eng. R. Cas. 45; *City of Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 56 Am. & Eng. R. Cas. 549; *Union Pac. R. Co. v. Hall*, 91 U. S. 343; *Rex v. Severn & W. R. Co.*, 2 Barn. & Ald. 646; *Com. v. Fitchburg R. Co.*, 12 Gray, 108; *Ohio & M. R. Co. v. People*, 120 Ill. 200, 30 Am. & Eng. R. Cas. 509; *People v. Albany & V. R. Co.*, 24 N. Y. 261.

Charter Provisions as to Voting Stock as affected by Admission of Territory which granted the Charter as a State, Adoption of Constitution, and Subsequent Legislation—Waiver of Charter Rights.—In *Smith v. Atchison, T. & S. F. R. Co.* (U. S. Cir. Ct. Dist. Kan., 1st Div., Nov. 5, 1894), 64 Fed. Rep. 272, it appeared that the charter of the defendant which was granted

in 1859, by a special act of the territory of Kansas, provided that each share of its stock should be entitled to one vote; that on the admission of the territory as a state its constitution contained a provision that all laws and parts of laws in force in the territory at the time of the acceptance of the constitution, not inconsistent therewith, should continue and remain in force until their expiration or repeal, and also provided that the legislature should pass no special act conferring corporate powers, that corporations might be created under general laws, but that all such laws should be subject to amendment or repeal, and continued all rights arising under the territorial government; that in 1876 an act was passed, which was subsequently amended (1881), which as amended provided that "in all elections for directors or trustees of any incorporated company, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares so held by him or her in said company multiplied by the number of directors or trustees to be elected at such election, and each shareholder may cast the whole number of votes either in person or by proxy for one candidate, and such directors or managers shall not be elected in any other manner;" and it was held, that the state legislature had no authority to amend the charter of the defendant company without its consent, and that the statute of 1876 as amended had no application to its elections.

It was also held that the right to amend the charter was not reserved to the territory by an act passed prior to the granting of the charter which provided, that "The charter of every corporation that shall hereafter be granted by law, shall be subject to alteration, suspension, or repeal by any succeeding legislature; provided, such alteration, suspension, or repeal, shall in nowise conflict with any right vested in such corporation by its charter," for the reason that the rights of the shareholders to each cast a vote was a vested right.

It was further held that the act of 1876 was not assented to or accepted by the company by reason of its acceptance of and action under statutes conferring certain rights on railroad corporations, but containing no provisions indicating an intention to abrogate any existent rights or privileges. The court said: "That the powers and privileges given by corporate charters become vested rights and contract obligations has been decided so often that it is no longer a debatable question. Commencing with the Dartmouth College Case, in 4 Wheat. 518, there is a uniform line of decisions on that subject down to the present day. *Farrington v. Tennessee*, 95 U. S. 685; *Edwards v. Kearney*, 96 U. S. 595; *Hays v. Com.*, 82 Pa. St. 522; *State v. Greer*, 78 Mo. 188; *Pierce v. Com.*, 104 Pa. St. 150; *Wright v. Water Co.*, 67 Cal. 532, 13 Am. & Eng. Corp. Cas. 89; *Baker's Appeal*, 109 Pa. St. 461; *Railroad Co. v. Duncan*, 111 Pa. St. 361, 29 Am. & Eng. R. Cas. 354; *Com. v. Philadelphia & E. R. Co.*, 164 Pa. St. 252.

Construction of Pennsylvania Act of 1889 Relating to Companies Incorporated under Unconstitutional Acts, and to Street-car Companies—"Under Color" Defined.—In *Berks County v. Reading City Pass. R. Co.* (Pa., March 25, 1895), 31 Atl. Rep. 474. it was held that the act of 1889, § 20, which declares all companies theretofore incorporated under certain unconstitutional acts and street passenger-railway companies "heretofore existing under color of any charter or letters-patent of the commonwealth," upon accepting the provisions of the act (of 1889) shall thereupon become and be a body corporate, and shall be entitled to and have possession of all the privileges, franchises, powers conferred by this act upon corporations created thereunder, afforded a way for companies organized under laws that were invalid, to secure a lawful corporate charter, and also opened the way for companies legally authorized under special acts to come in under the provisions of the statute.

It was also held that the words "under color" as used in the act were used as the equivalent of under authority of.

Masachusetts Statute Requiring Railroad Company to Provide and Operate Ferry by Specified Time—Effect of Extension by Commissioners of Time to Comply with Statute.—In *Brownell v. Board of Railroad Commissioners* (Mass., March 2, 1895), 39 N. E. Rep. 1111, it was held that under an act (1894, ch. 392) requiring a railroad company to provide and operate a ferry between certain towns on and after a certain date, and that the company should forfeit a designated sum per day for each day's delay in operating such ferry after the date fixed, or after the expiration of such further time as the railroad commissioners might upon hearing prescribe, and conferring on the court upon a petition of 10 or more citizens jurisdiction in equity to enforce the provisions of the act, the commissioners had power to grant further time to the company to comply with the act on a petition filed by it after the designated date, but could not grant further time so as to relieve the company from the penalties without likewise relieving it from the obligation.

It further appeared that the company requested the commissioners to prescribe such time for delay in operating the ferry as might appear to be reasonable, and an order was made designating February 1, 1895, as the day after which, instead of after the day fixed by the act, the penalties should be inflicted, and it was held that there was a delay granted for all purposes up to February 1, 1895.

Certified Copy of Final Certificate of Incorporation of Railroad Company as Proof of Incorporation—Alabama Statute.—In *Willingham v. State* (Ala., Aug. 9, 1894), 16 So. Rep. 116, it was held that section 1578 of the Code which requires the record of certificates of incorporation by the secretary of state, and section 2785, which provides that all transcripts of books or papers required by law to be kept in the office of the secretary of the state or the office of the auditor when certified by the proper custodian thereof, must be received in evidence in all courts, make a certified copy of the final certificate of incorporation of a railroad company admissible for the purpose of proving such incorporation.

Construction of Act of Congress of July 2, 1864, Relating to Telegraphic Arrangements of the Pacific Railway Companies.—In *Union Pacific R. Co. v. United States* (U. S. Cir. Ct. App. 8th Cir., Jan. 29, 1894), 59 Fed. Rep. 813, it was held that by the act of July 2, 1864, providing (in section 4) that "the several railroad companies authorized by act of congress, July one, eighteen hundred and sixty-two, are authorized to enter into arrangements with the United States Telegraph Company so that the line of telegraph between the Missouri River and San Francisco may be made upon and along the line of said railroad and branches as fast as said roads and branches are built, and if said arrangements be entered into, and the transfer of said telegraph line be made in accordance therewith to the line of said railroad and branches, such transfer shall, for all purposes of the act referred to, be held and considered a fulfilment on the part of said railroad companies of the provision of the act in regard to the construction of a telegraph line; and, in case of disagreement, said telegraph company are authorized to remove their line of telegraph along and upon the line of railroad therein contemplated, without prejudice to the rights of said companies," congress intended that the privileges in question should be shared by any corporation which became lawfully associated with the United States Telegraph Company in the work of constructing a transcontinental line, and more especially that the privilege should inhere in a corporation with which the United States Telegraph Company became lawfully united by the process of consolidation. The court said: "After a very full consideration of the question it was held by Mr. Justice MILLER, as far back as 1880, in the case of *W. U. Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. Rep. 721, 727,

728, that the contract of October 1, 1866, embodies such an 'arrangement' as was contemplated and authorized by the fourth section of the act of July 2, 1864, above quoted, and such an 'arrangement' as, if carried out, would absolve the railway company with which it was made from the obligation to construct and operate an independent line of telegraph. The court said in that case 'that it was manifestly the design of the act of 1864 to enable the United States Telegraph Company to become substituted, by a proper arrangement with the Pacific Railroad Company and its branches, to the right to build a telegraph line along the * * * right of way of those railroad companies, and thereby to relieve those companies from the obligation to build and operate such a line. It furthermore said, in substance, that the contract of 1866 satisfied all the requirements of the act of July 2, 1864, notwithstanding the fact that it prohibited the railway company from transmitting commercial messages. In that case, however, the evidence then before the court did not disclose whether the Western Union Telegraph Company was in fact the legal successor of the United States Telegraph Company, and that the point was left undetermined, with the statement, however, that the contract of 1866 was clearly valid if such successorship was thereafter established."

Right of Union Pacific Railroad Company to Contract with Telegraph Company for Joint Maintenance of Poles—Validity of Agreement Conferring Exclusive Rights so far as Railroad Company Could Legally do so.—In *Union Pacific R. Co. v. the United States* (U. S. Cir. Ct. App. 8th Cir., Jan. 29, 1894), 59 Fed. Rep. 813, it was held that the Union Pacific Railroad Company, in the discharge of its obligation to maintain a telegraph line, was not precluded from contracting with a telegraph company for the joint maintenance of poles upon the right of way of the railroad company for the suspension of wires, by anything contained in the acts of July 5, 1862, and July 2, 1864, where the railroad company maintained its own telegraphic offices and operators sufficient to fulfil its obligations respecting the transmission of commercial messages as well as those in connection with its own business.

It was also held that the agreement with the telegraph company was not in restraint of trade and against public policy and for that reason illegal and void, because binding the railroad company to assure to the telegraph company an exclusive right of way so far as it legally could do so, and to refuse aid for the construction of other lines in so far as it could lawfully withhold the same.

Act of Congress of Aug. 7, 1888, Requiring Pacific Railway Company to Afford Equal Facilities to Telegraph Companies—Method of Enforcing Obligations.—In *Union Pacific R. Co. v. United States* (U. S. Ct. App. 8th Cir., Jan. 29, 1894), 59 Fed. Rep. 813, it was held that the act of congress of 1888, Aug. 7, § 2, which requires the Pacific Railway Companies to afford equal facilities to all connecting lines of telegraph companies imposes an obligation which should be enforced by application to the interstate-commerce commission, and not by a bill in equity.

Construction of Portion of Act Relating to Enforcement.—In *Union Pacific R. Co. v. United States* (U. S. Cir. Ct. App. 8th Cir. Jan. 29, 1894), 59 Fed. Rep. 813, it was held that the court would not assume that congress intended by the fourth section of the act of August 7, 1888, which provides "that in order to secure and preserve to the United States the full value and benefit of its liens upon all the telegraph lines * * * constructed by and lawfully belonging to said railroad and telegraph companies referred to in the first section of this act [being those mentioned in the Pacific Railroad acts] and to have the same possessed, used, and operated, in conformity with the provisions of this act and of the several acts to which this act is supplementary—it is * * * made the duty of the attorney-general * * * by proper proceedings, to prevent any unlawful interference with the rights

and equities of the United States * * * to have legally ascertained and * * * adjudicated all alleged rights of all persons and corporations * * * claiming * * * any control or interest * * * in any telegraph lines or property, or exclusive rights of way upon the lands of said railroad companies, * * * and to have all contracts and provisions of contracts set aside, * * * which have been unlawfully and beyond their powers entered into by said railroad or telegraph companies, * * *," to authorize matters of legal and equitable cognizance to be mingled indiscriminately in the same complaint, and that all the rights and duties mentioned in said act, of whatsoever nature, should be enforced in a single suit, to be instituted by the attorney-general in the name of the United States. The court said: "Even if congress has power to so direct, we should not feel authorized to say that it has done so, without a positive declaration of such purpose, which we do not find in the statute now in question. Some of the duties imposed by the act of August 7, 1888, which the government apparently seeks to enforce in this suit, are evidently of such a nature that they may be adequately enforced at law. Among these may be mentioned the duty enjoined upon the Union Pacific Railway Company, by the first section of the act, of operating 'by itself alone, through its own corporate officers, its telegraph lines.' We know of no reason why this precise duty may not, and should not, be enforced by *mandamus*, if it has in fact been violated. U. S. v. Union Pac. R. Co., 98 U. S. 569, 609; Attorney-general v. Utica Ins. Co., 2 Johns. Ch. 371."

STATE *ex rel.* CROSSLAND

v.

OMAHA AND COUNCIL BLUFFS RAILWAY & BRIDGE CO. OF
IOWA *et al.*

(Iowa Supreme Court, October 2, 1894.)

Forfeiture of Charter by Court in Absence of Violation of Charter.—In the absence of provisions in a charter as to what violations thereof shall amount to a forfeiture, the court is vested with discretion, and may refuse a judgment of ouster if, in its opinion, the interests of the public do not require such a judgment.

Same—Continuation of Corporate Existence to Subserve Public Interests.—Where the public interests demand that the corporate existence of a street railway and bridge company connecting two cities shall not be forfeited, its corporate existence should be continued, to the end that it may respond to its obligations to the city, to individuals, and to the general public.

Same—What Facts will Warrant a Forfeiture of Charter.—To warrant a judgment forfeiting a charter, there must have been such a wilful or improper act or such neglect as will work or threaten a substantial injury to the public.

Same—Lease of Corporate Property to Save Question as to Validity of Act of Congress—Intent to Defraud Public.—A railway and bridge company was organized under the laws of one state for the purpose of constructing and maintaining a bridge across a river between it and the adjoining state, so as to connect two cities. The terminal city in the state

wherein the company was organized empowered the corporation to lay tracks within the municipality upon payment of the cost of paving between the tracks. Subsequently, by act of congress (March 3, 1887), the maintenance of the bridge was authorized, and the corporation operating it was designated by the corporate name of such company; but the act stated that such company was an organization of both states. Thereafter a corporation was formed in the adjoining state, under the same name and practically controlled by the same parties, for the evident purpose of settling any question as to the validity of the act of congress, to which the first-mentioned corporation leased and transferred its interests, and after such lease and transfer ceased to have any active existence. *Held*, that there was no such evidence of an intent to defraud the public as would warrant the forfeiture of the charter of the lessor company, because of the refusal of the lessee company to pay for the paving, as provided in the ordinance authorizing the occupation of the street by the lessor company.

Failure of Foreign Corporation to Conform to Statutory Requirements as to Doing Business—Allowing Opportunity to Qualify.—Although a foreign street railway and bridge company may have been guilty of illegally holding and exercising franchises and privileges without first having obtained permission so to do, yet if the failure to secure such permission was without wrongful intent, and the public interests will not be served by an unqualified exclusion of such corporation from the exercise of the franchises and privileges in the future, the court will not unconditionally oust such company, but will render a judgment of ouster, to become operative in the future unless the company shall, prior to the time when such judgment is to become effective, qualify itself to exercise its corporate functions by compliance with the statutory requirements.

APPEAL from Council Bluffs superior court.

This is a civil action by ordinary proceeding under chapter 6, tit. 20, of the Code, wherein the plaintiff asks, for reasons alleged, that the charter and franchise of the Iowa corporation "be ordered and adjudged forfeited, and the same be cancelled and the said corporation dissolved, and that the defendant the Nebraska corporation, as well as the defendant the Iowa corporation, be required to show cause, if there be any, why such order and judgment should not pass;" that all the rights and privileges conferred on said Iowa corporation by its corporate organization, and by virtue of a certain ordinance of the city of Council Bluffs passed in 1886, and all rights or privileges claimed by defendants, or either of them, under or by virtue of said corporate existence and franchises, and all rights and privileges claimed to be held by said Nebraska corporation by virtue of its purchase of the stock and lease of the property of the Council Bluffs Street-Railway Company, or by virtue of said ordinance of 1886, be forfeited and cancelled and annulled; and that defendants be prohibited from the exercise of any of said rights, privileges, or franchises.

Defendants answered, admitting their corporate organization, as alleged, and the execution of the contract set out as "Ex. A," and denying every other allegation in the petition.

The case was tried to the court, and judgment entered against the defendants substantially as prayed, and trustees appointed, to all of which defendants excepted, and from which they appeal, assigning as error the entering of said judgment.

Other errors are assigned upon the admission and exclusion of evidence, but as they are not argued they will not be considered.

Wright & Baldwin, for appellants.

Harl & McCabe and Spencer Smith, for appellee.

GIVEN, J.—1. In 1868 the city of Council Bluffs granted to the Council Bluffs Street-Railway Company the right to construct and operate a street railway on certain streets, and requiring it to construct additional lines to any depot or ferry thereafter opened in the city. Said company constructed and operated a single-track horse railway on various streets until 1888. Additional statement.

October 20, 1886, the defendant the Iowa corporation was duly organized under the laws of this state, its second article being as follows: "The general nature of the business to be transacted by this corporation shall be to construct, operate, and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, elevated, cable, or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs. This corporation shall have and possess all the powers given it by law, and such as are usually incident to corporations of this character; and among which is the power to make contracts, acquire and transfer all kinds of property necessary to the transacting of its business, and including the right and power to borrow money on notes, bonds, and mortgages, and to secure the payment of the same by pledging all or any portion of its property and its income for such purpose, provided that the indebtedness of the company shall at no time exceed the capital stock paid in."

October 29, 1886, an ordinance of the city of Council Bluffs was approved, providing "that consent, permission, and authority is hereby given and granted to and vested in the Omaha & Council Bluffs Railway and Bridge Company, and its successors and assigns, to construct, equip, maintain, and operate, for the term of twenty-five years, upon the conditions hereinafter found, a single or double track street railway," etc.

Among the conditions thereafter found are the following: "The tracks of said company shall be laid so as to conform to

the established grade of any street on which the road may be built, wherever the city has or hereafter may establish such grade. Where the streets are not graded said company may lay its tracks so as to conform to the surface of such streets, but that said company shall grade its road bed and conform to the established grade of all streets at its own expense, where it is authorized to lay down tracks under this ordinance, whenever the city shall establish the grade of such or any part thereof. In case the city shall at any time pave any street along which said railway may run, said company shall at its own expense at the same time, with the same material, pave the space between the rails of its track and one foot outside of the rails, so that it shall substantially correspond with the paving of the street outside of the rails and track. Where tracks are laid upon a street already paved, the company shall pay the property owners abutting for the paving between the rails and one foot outside thereof. And in laying its tracks said company shall restore said streets, whether paved or not, to as good condition as before the laying down of its tracks thereon; and shall conform to all grades and keep waterways and culverts in good repair at its own expense for the passage of water along or across its tracks."

October 30, 1886, said ordinance was accepted by said Iowa corporation.

On November 2, 1886, the voters of the city of Council Bluffs voted a tax of 12 mills for the purpose of aiding said Iowa corporation "in the construction of a highway bridge over the Missouri river at a point commencing at the foot of Broadway street or within 300 feet thereof, on either side, in the city of Council Bluffs, Iowa, at and opposite the same in Iowa and terminating opposite the City of Omaha, Nebraska."

March 3, 1887, an act of congress was approved, providing that "the Omaha & Council Bluffs Railway & Bridge Company, an incorporation organized under the laws of the states of Nebraska and Iowa, its successors or assigns, is hereby authorized to construct and maintain a bridge across the Missouri river at the point between the cities of Omaha, Nebraska and Council Bluffs, Iowa, and at least one third of a mile from any other bridge, as shall best promote the public convenience and welfare."

April 1, 1887, the Nebraska corporation completed its organization by executing and filing articles in Nebraska as required by the laws of that state, under the name of the Omaha & Council Bluffs Railway & Bridge Company, the purpose being as follows: "The general nature of the business to be transacted by the corporation shall be, in connection with the Omaha & Council Bluffs Railway & Bridge Com-

pany of Iowa (a corporation organized and existing under the laws of the state of Iowa), to construct and operate and maintain a bridge across the Missouri river at and opposite the cities of Omaha, Nebraska, and Council Bluffs, Iowa, and also a steam, electric, motor, horse, and elevated, cable, or other line of railway, and a public way across said bridge, and within the counties of Douglas, Nebraska, and Pottawattamie, Iowa, with the termini thereof in the said cities of Omaha and Council Bluffs."

May 14, 1887, the Iowa corporation and the Nebraska corporation entered into a contract in writing by which the Iowa corporation "hereby sells, assigns, transfers, and sets over" to the Nebraska corporation "said tax voted by the voters of Council Bluffs." Said Iowa corporation also "hereby lets, leases, grants, and gives" to said Nebraska corporation "for the term of ninety-nine years, * * * all the said party of the first part's right to interest and property" under said ordinance of October 29, 1886, and said act of congress, in consideration whereof the Nebraska corporation "hereby undertakes and agrees to give, in full consideration thereof, to the said party of the first part, for the benefit of its stockholders, one half of all the shares of the full paid-up capital stock of the said Omaha & Council Bluffs Railway & Bridge Company of Omaha, Nebraska."

October 1, 1888, the Nebraska corporation leased from the Council Bluffs Street-railway Company, for a consideration and upon conditions that need not be stated, for the term of 25 years, its entire system and property of every kind. After the transfer by the Iowa corporation to it, the Nebraska corporation constructed a bridge across the Missouri river, and a double-track electric motor line connecting the two cities, to the business centre of each, and three branch lines in Council Bluffs. A power-house was erected and equipped in Council Bluffs, and necessary rolling-stock provided. This work was completed in December, 1888, since which time the Nebraska corporation has managed and operated said bridge and railway without having qualified itself to do so as required by chapter 76, Acts 21st Gen. Assem.

The Nebraska corporation received the tax voted by Council Bluffs to aid in the construction of the bridge, and in July, 1887, executed a mortgage upon its property and franchises then held or thereafter to be acquired, to secure its bonds for \$500,000, the proceeds of which, and of said tax levy, were paid on the construction of the work.

It is not questioned but that the railway and bridge were properly constructed and equipped, and have since been properly managed and operated. The complaint is that sec-

tion 3 (copied above) of said ordinance of 1886 was not complied with, in the following particulars: That the line on Avenue A, Council Bluffs, was laid on an embankment formed of earth, taken from the sides of the streets, whereby the street was rendered impassable, and was allowed to so remain for over two years, when the city filled the excavations; that, in laying tracks in streets where no grade had been established, the tracks were not laid to conform to the surface of the ground; that tracks were laid upon streets previously paved, "but no attempt was made to pay for the paving used, to abutting property owners."

The evidence shows that stock of the Nebraska corporation was delivered to the Iowa corporation as agreed, and that the Iowa corporation has not since held regular meetings, or transacted any business.

It also shows: That an action was brought by the relator and others, for themselves and assignees of the claim of others, against the Nebraska corporation to recover \$5075.46 due for paving in front of their properties laid previous to the construction of the tracks.

The defendant answered, setting up the leases to it from the Iowa corporation and from said street-railway company, and denying liability to the plaintiffs. That the city of Council Bluffs brought a like action to recover \$5431.13 for money paid for paving intersections which were paved prior to the laying of defendant's tracks at such intersections; also, to recover for filling the excavations on Avenue A.

Defendant answered, denying that there was any statute entitling plaintiff to recover for the previous paving of intersections, and denying that it had anything to do with laying the track referred to, and alleging that it was laid by said street-railway company.

Such are, in substance, the material facts upon which we are to determine whether the lower court erred in rendering the judgment that it did.

2. Subdivision 4 of section 3345 of the Code authorizes actions like this "against any corporation doing or omitting acts which amount to a forfeiture of their rights and privileges as a corporation, or exercising powers not conferred by law." Section 3356 provides "if a corporation be found to have violated the law by which it holds its existence, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges, judgment shall be rendered that such defendant be ousted and altogether excluded from such * * * franchise or privileges."

Our first inquiry is whether the Iowa corporation had done or omitted acts which amount to a forfeiture of its rights and

privileges as a corporation, or exercised powers not conferred by law, or, in the language of section 3356, whether it has "violated the law by which it holds its existence, or in any manner to have done acts which amount to a surrender or forfeiture of its privileges."

As the statute does not define what acts, omissions, or violations of law will amount to a surrender or forfeiture of corporate existence or privileges, we must refer to the common law to determine that matter.

All corporations derive their right to exist and act as such from the state, and all public and quasi-public corporations in addition thereto are vested by the state with certain special privileges wherein the general public are interested. In return the corporation becomes bound to perform towards the public all the conditions upon which its right to exist and its special privileges are granted. For a concise statement of the distinction in the several classes of corporations, see *Ditch Co. v. Zellerbach*, 37 Cal. 543.

This corporation being organized under the general laws of the state, they, with its articles of incorporation, "create the same relation between the state and the corporation which would exist if the general laws applicable to the corporation, and the articles of incorporation were embodied in a special act of the legislature creating the corporation, and defining its general powers." *State v. Central Iowa Ry. Co.*, 71 Iowa 415.

A failure to substantially comply with the express provisions or conditions of the articles and of the general laws, or a wilful misuse or nonuse in regard to matters which go to the essence of the contract between the corporation and the state, are acts and omissions which amount to a forfeiture *Ang. & A. Corp. § 774; Boone, Corp. § 203; Mor. Priv. Corp. 1014; Tayl. Corp. § 457; Wat. Corp. § 427; Insurance Co. v. Needles*, 113 U. S. 574, 8 Am. & Eng. Corp. Cas. 295; *State v. Minnesota Cent. Ry. Co.*, 36 Minn. 246, 29 Am. & Eng. R. Cas. 404; *State v. Council Bluffs & N. Ferry Co.*, 11 Neb. 354; *State v. Farmers' College*, 32 Ohio St. 487.

Courts act with extreme caution in proceedings like this, and forfeitures will not be declared, except under the express provisions of the charter, or for a plain misuse or nonuse of powers, by which the corporation falls to fulfil the design and purpose of its organization. *State v. Farmers' College, supra; State v. Commercial Bank*, 10 Ohio 535; *Harris v. Railroad Co.* 51 Miss. 602; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *State v. Real-estate Bank*, 5 Ark. 595; *State v. Société Republicaine*, 9 Mo. App. 114.

It is only such acts or omissions as concern matters which

are of the essence of the contract between the state and the corporation, or, in other words, in which the public have an interest, that are causes of forfeiture. *Commercial Bank v. State*, 6 Smedes & M. 599; *Attorney-General v. Petersburg & R. Ry. Co.*, 6 Ired. 456; *Harris v. Railroad Co.*, 51 Miss. 602; *State v. Council Bluffs & N. Ferry Co.*, *supra*; *Thompson v. People*, 23 Wend. 538; *State v. Real-estate Bank*, *supra*; *State v. Minnesota Cent. Ry. Co.*, *supra*. A substantial performance of conditions is all that is required. *People v. Kingston & M. Turnpike-road Co.*, 23 Wend. 193; *People v. Fishkill & B. Plank-road Co.*, 27 Barb. 455; *People v. Williamsburg Turnpike & Bridge Co.*, 47 N. Y. 586; *Commercial Bank v. State*, *supra*; *State v. Wood*, 84 Mo. 378; *State v. Farmers' College*, *supra*; *Chicago City Ry. Co. v. People*, 73 Ill. 541; *Harris v. Railroad Co.*, *supra*.

In *Commercial Bank v. State* it is said: "The law requires but a substantial compliance with conditions, and it is not rigid in enforcing forfeitures; yet, if the utility of the corporation be lessened, or if an injury result to the public by an act which it is not authorized to do, it is a forfeiture." A failure to perform obligations to individuals or to other corporations is not ground of forfeiture, for the state does not concern itself with the quarrels of private litigants. 1 Beach, *Priv. Corp.* § 8.

3. By the contract with the Nebraska corporation the Iowa corporation transferred to it, absolutely, all its rights to the tax voted in aid of the construction of the bridge, and leased to it all its rights and privileges under the act of congress and said ordinance of 1886 for the period of 99 years. In return for this the Nebraska corporation delivered one-half of the shares of its paid-up capital stock to the Iowa corporation, for the benefit of its shareholders, to whom the same were distributed.

Under authority of this contract the Nebraska corporation constructed the railway and bridge in all respects as required by said act of congress and said ordinance of 1886, except that in laying the tracks in streets where no grade had been established the tracks were not laid to conform to the surface of the ground, and it did not restore streets in which tracks were laid to as good condition as before laying the same, or pay to abutting owners for paving previously laid. Under this contract the Nebraska corporation has operated this railway and bridge in all respects, as far as alleged or appears, with due regard to the public interests, and in accordance with said act of congress and said ordinance.

It is contended that this transaction between these cor-

porations was consummated with intent to defraud the public. We do not concur in this view. We are satisfied that the thought of organizing the Nebraska corporation was first suggested by the language of the act of congress, the grant therein being to "the Omaha & Council Bluffs Railway and Bridge Co., an incorporation organized under the laws of the states of Nebraska and Iowa." We are satisfied that it was organized with the view of placing the right to the grant from congress beyond question. The two corporations were composed of and officered by the same men, and they were organized by the same name and for the same purpose. The Nebraska corporation was organized, as is said in its articles, for the same business to be transacted in connection with the Iowa corporation. The purpose of the transfer and lease was, we think, to place the construction and operation of the railway and bridge in the hands of one company for the period named, to avoid complications that were likely to arise if both organizations were to exercise control in the construction and operation of the road and bridge. This may not have been the legal or best mode of accomplishing the end, but such we think was the purpose. We fail to discern wherein there was any fraudulent intent, for surely the obligations of each company to the public and to individuals remained the same as before the contract, and it is not alleged that either was insolvent.

The lease taken by the Nebraska company from the Council Bluffs Street-railway Company does not indicate an intention to defraud, nor does the fact that the Nebraska company claimed certain rights under that lease ^{Intent to defraud.} in the actions against it indicate such an intention. It is not fraud for that corporation to claim whatever rights it may be entitled to under that lease. However irregular or illegal the course pursued by the defendant companies may have been, we are satisfied it was in good faith, and without any fraudulent purpose.

Let it be conceded, as claimed, that said contract was unauthorized, is in violation of the contract with the state, and void; that the failure to lay the tracks to conform to the surface, to put the streets in as good condition as before the tracks were laid, and the failure to pay abutting owners for paving previously laid, are violations of conditions in the charter of the Iowa corporation. Still the question remains whether, even for such violations, we should adjudge a forfeiture against that corporation.

It is not expressly provided in its articles, or in the statute, that such violations amount to a forfeiture. If it was so provided it would only remain for the court to determine

whether such violations had occurred, but, not being so expressly provided, the court is vested with a discretion, and may refuse a judgment of ouster, if in its opinion the interests of the public do not require such a judgment. State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258; State v. Peoples' Mut. Ben. Ass'n, 42 Ohio St. 579; State v. Minnesota Cent. Ry. Co., 36 Minn., 246, 29 Am. & Eng. R. Cas. 404; State v. Crawfordsville & D. Turnpike Co., 102 Ind. 435; State v. Essex Bank, 8 Vt. 489; 2 Spell. Extr. Rel. p. 1493.

While it may be true the Iowa corporation did lease all its "interests and property" under said act of congress and said ordinance for the term of 99 years, still it exists to-day as a corporation subject to all the liabilities imposed upon it by said act of congress and said ordinance. It is the owner of said bridge and railway, subject only to the rights of the Nebraska corporation and its mortgagees therein; and, if from any cause the rights of the Nebraska corporation are terminated, the Iowa company is entitled to take possession, control, and management thereof, and to operate the same so as to carry out its obligations to the public. Surely, it cannot be said that this corporation has abandoned its rights to corporate existence, or that all necessity for its existence has passed away.

In case of forfeiture or failure on the part of the Nebraska company, this public enterprise, that has been thus far conducted with general satisfaction to the public, must fail and be terminated, if the Iowa corporation may not be continued in existence to meet such an emergency. It seems to us the public interests demand that the corporate existence of the Iowa company shall not be forfeited, but shall continue to exist, to the end that it may respond to its obligations to the city, to individuals, and to the general public.

4. We next inquire as to the Nebraska corporation. The court below held that the contract between the defendant and the contract between the Nebraska corporation and the Council Bluffs Street-railway Company were *ultra vires* and void; that the Nebraska corporation was a foreign corporation, and had failed to comply with the laws of Iowa authorizing such foreign corporations to exercise their corporate functions and franchises in this state, and that it had no legal right to exercise corporate privileges or functions within the state; that the provisions of the ordinance requiring payment to abutting property-owners for paving done previous to laying down tracks was a condition precedent to the use of the franchise

Discretion of
court.

Subservance
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Allowing oppor-
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granted by the ordinance, and that the refusal of the defendants to comply therewith was a wilful repudiation of the condition; that the obstructions created by the Nebraska corporation in Avenue A, and a failure to construct the line in accordance with the ordinance, was in violation of law, contrary to public policy, and a wilful misuser and abuse of the franchise granted by the ordinance.

It was upon these conclusions that judgment was entered ousting the Nebraska corporation from the exercise of any or all privileges exercised by it in the city of Council Bluffs, and of any rights, privileges, or franchises under each of said two written contracts. Again, we have to say that, conceding these conclusions to be correct, still the question remains whether the public interests require that such a judgment be entered against the Nebraska corporation. As already stated, the railway and bridge were constructed and operated with due regard to the public convenience and interests. To warrant this judgment there must have been a wilful or improper act or neglect, such as to work or threaten a substantial injury to the public. "The transgression must not be merely formal or incidental, but material and serious, such as to harm or menace the public welfare." 1 Beach. Priv. Corp. § 58. "A charter will not be revoked for every wrongful act committed by a corporation. A single act of abuse or wilful nonfeasance may be a ground for a forfeiture; but where an act of nonfeasance has not been committed wilfully or negligently, and does not injure any one, and is not expressly forbidden by the charter, the courts will not, in general, apply the severe remedy of a judgment of forfeiture." 4 Am. & Eng. Enc. Law, p. 306.

In *People v. Bristol & R. Turnpike-road Co.*, 23 Wend., at page 236, it is said: "The prosecution before us goes on corporate default or corporate wrong, which must, I think, be more than accidental negligence, or a mere mistaken excess of power, or a mistake in the mode of exercising an acknowledged power. There must be an abuse of trust, etc. The Nebraska corporation was organized under the laws of that state, and it is true that it did not make application for nor receive a permit to transact the business that it did in the state of Iowa, as required of foreign corporations by chapter 76, Acts 21st Gen. Assem.; McClain's Code, § 1641, and following. The only explanation given for this omission is found in the answer of the defendants to interrogatories propounded by the plaintiff, as follows: "The Nebraska corporation was organized, as shown by its articles of incorporation, in connection with the Iowa corporation, and as a part and parcel of the Iowa corporation; the president and secretary of the

Nebraska corporation having always resided in Council Bluffs, Iowa, since the organization, and, by the articles of incorporation, one-half of the board of directors must and do reside in Iowa."

In view of the severe penalties provided in said chapter 76, we cannot think that the omission to take out a permit was the result of mere negligence. We are convinced that a permit was not applied for under the belief that it was not required, because of the character and relations of the two organizations, of the business to be transacted, and the place at which it was to be transacted. This was a mistaken belief, but, if these corporations proceeded under that belief, they did not act wilfully, or with any wrongful intent.

We think the Nebraska corporation was guilty of illegally holding and exercising the franchises and privileges that it did in Iowa without first having a permit to do so, but we cannot see that it will serve the interests of the public to unqualifiedly exclude that corporation from those franchises and privileges in the future, when it can so readily qualify itself to exercise them. As to the conditions provided in the ordinance, upon the disregard of which the judgment was based, we think the city and the abutting property-owners have ample remedy in the ordinary processes of the law, and that the general public is not interested in any questions that may arise between them and either of the defendants, based upon said conditions.

We are clearly of the opinion, upon the whole record, that though the Nebraska corporation has heretofore unlawfully exercised its corporate powers in this state, yet there is no public interest demanding that it shall be unconditionally ousted from the exercise of said privileges and franchises. Nor do we think that it should be thus ousted for any of the other reasons assigned.

Our conclusion is that the judgment of the district court, as to the defendant the Iowa corporation, should be reversed, and that the judgment as to the Nebraska corporation should be modified so as to take effect within 60 days after final judgment, unless said Nebraska corporation shall show to the court that it has qualified itself to exercise its corporate functions in this state by compliance with said chapter 76 of the Acts of the 21st Gen. Assem.

Reversed in part, and modified and affirmed in part.

DEEMER, J., taking no part.

Non-user or Misuser of Franchise as Cause for Forfeiture.—See *Burnham v. Greenburg & Rushville R. Co.*, 14 Am. & Eng. R. Cas. 43, and note, 46; *State v. Hazelton & Leetonia R. Co.* (Ohio), 20 Am. & Eng. R. Cas. 560, and note, 561.

Forfeiture of Charter.—See *State ex rel. Hahn v. Minnesota Central R. Co.* (Minn.), 29 Am. & Eng. R. Cas. 440, and note, 451; *Bywater v. Paris & Great Northern R. Co.* (Tex.), 38 Am. & Eng. R. Cas. 498, and note, 501; *In re Brooklyn Elevated R. Co.* (N. Y.), 46 Am. & Eng. R. Cas. 251, and note, 257.

Corporations Created by Concurrent Action of More Than One State—Status of Corporation.—See note, 25 Am. & Eng. R. Cas. 67, 76.

Forfeiture of Charter—Who May Take Advantage of Failure of Company to Complete Road as Required by its Charter.—In *Chicago & E. I. R. Co. v. Wright*, 153 Ill. 307, it was held that the failure of a railroad company to complete its road within 8 years after the passage of its act of incorporation, in accordance with the provisions of its charter in that behalf, could only be taken advantage of by the state. *Citing* *Ross v. Railroad Co.*, 77 Ill. 127; *Baker v. Backus' Adm'r*, 32 Ill. 79; *Thompson v. Candor*, 60 Ill. 244; *Railway Co. v. Smith*, 111 Ill. 363, 29 Am. & Eng. R. Cas. 558; *Kirby v. Railway Co.*, 109 Ill. 412.

Reorganization of Street-railway Company After Foreclosure—Liability of Reorganized Company—Virginia Statutes.—In *Langhorne v. Richmond City R. Co.* (Va., March 15, 1894), 19 S. E. Rep. 122, it appeared that by the terms of the act of March 20, 1860 (acts 1859-60 page 406), street railroads in the city of Richmond were not subject to chapter 61 of the code of 1849, which provides that upon the sale of the property of a railroad corporation under a lien, the purchasers may become a new corporation by any name they may select and record, and as such not subject to any debts or liabilities of the old corporation except such as may have been assumed at the sale, but such companies were subject to chapters 56 and 57 of the code. A street-railway company which was excepted from the operation of section 61 by its act of incorporation, after foreclosure of a deed of trust of its property, was reorganized by the purchasers who were stockholders and officers of the mortgagor, an extension of the charter of the road was obtained from the city of Richmond, and under an act recognizing the reorganized company by its original name, the property and franchises of the mortgagor was transferred to the new company which assumed the liabilities of the old company, and proceeded to do business under another name, and it was held that the purchasers at such sale merely became corporators in the old corporation, and that the effect of the transactions was merely to change its name, without dissolution or change of identity, and that it was charged with all existing liabilities.

Action Against Company Formed by Consolidation—Requisites of Declaration.—In *Langhorne v. Richmond City R. Co.* (Va., March 15, 1894), 19 S. E. Rep. 122, it was held that where several companies have been consolidated, the consolidated company may be sued directly upon a cause of action existing against one of the consolidated companies; but the declaration should show against which company it arose, and such other matters of fact as will subject the new company to the suit. *Citing* *Railroad Co. v. Harbin*, 40 Ga. 706, 4 Am. & Eng. Enc. Law, 272; *Prouty v. Railroad Co.*, 85 N. Y. 272; *Railway Co. v. Powell*, 40 Ind. 87; *Jones, Ry. Secur.* § 415, p. 393; *Railway Co. v. Skidmore*, 69 Ill. 566; *Railroad Co. v. Smith*, 75 Ill. 496; *Railroad Co. v. Jones*, 29 Ind. 465; *Agricultural College v. Baxter's Estate*, 42 Vt. 99; *Boardman v. Railway Co.*, 84 N. Y. 157; *Railroad Co. v. Langton*, 32 Mich. 251.

STEVENS *et al.*

v.

CENTRAL NATIONAL BANK OF BOSTON *et al.*(144 *New York*, 50.)

Jurisdiction of State Court to Review Judgment of Federal Court.—An action may be brought in a state court to bring before it all the parties in interest and review a judgment of the United States circuit court, to vacate it as fraudulent, and to deal as a court of equity with the holders of receivers' certificates issued under such judgment, notwithstanding that the federal court had jurisdiction of the subject matter of the suit in which the judgment was entered and that its decree was proper and binding upon the parties before it.

Same—Power to Enjoin Sale Under Judgment Fraudulently Procured in Federal Court.—The state court having jurisdiction over all the parties for the purpose of giving complete relief, in dealing with the entire subject matter has the power to enjoin a sale under the alleged fraudulent judgment.

Fraudulent Nature of Proceedings by One Mortgage Bondholder Without Bringing in All Parties Interested.—An action was brought by a bondholder of a railroad company to charge purchasers on foreclosure as trustees for the bondholders, in which action other bondholders made application to be allowed to come in, which application was denied. Subsequently a receiver was appointed and authorized to issue certificates as a first lien on the property, and the property was sold. Thereafter one of such certificate holders brought an action against the purchasers at foreclosure asking to have the lien of the certificate declared paramount, and for a sale, which suit was removed to the United States circuit court on the ground of diverse citizenship, where a decree was entered in favor of the plaintiffs and a sale of the property ordered. *Held*, that the failure to bring in the necessary parties in the suit to charge the purchasers on foreclosure was sufficient to stamp the entire proceeding as colorable and fraudulent.

Laches of Complainants in Suit to Enjoin Enforcement of Decree in Federal Court.—The proceeding to enjoin the enforcement of the decree of the federal court was properly and seasonably brought within two years after the sale in the bondholders' suit.

Sufficiency of Judgment to Protect Holders of Receivers' Certificates.—The judgment in the suit at bar ordered a sale of the property, provided for payment of the net proceeds to the original bondholders and that as to the proportion coming to the bonds which were represented in the first-mentioned suit there should be paid so much thereof to the holders of the receiver's certificates as would be necessary to satisfy the same, and the balance, if any, to the holders of such bonds. *Held*, that the holders of the receivers' certificates were as fully protected as was possible, as the bondholders who brought the original suit were bound by the order and judgment authorizing the issue of such certificates.

APPEAL from general term supreme court Third department.
Matthew Hale, for appellants.

Edward Winslow Paige, for respondents.

BARTLETT, J.—This appeal involves a contest between the bondholders and holders of receiver's certificates of the Lebanon Springs Railroad Company and its successor, the Harlem Extension Railroad Company. Case stated.

A recital of the main facts in this litigation is essential, as it will present clearly the questions of law submitted for our determination.

The Lebanon Springs Railroad Company, in 1869, was operating its completed road from Chatham, N. Y. to Bennington, Vt. Prior to that time, in July, 1867, it issued and sold its bonds to the amount of \$2,000,000, and secured the same by mortgage to the Union Trust Company of New York, in trust, covering its property, rights, and franchises.

Early in the year 1870 the Lebanon Springs Railroad Company consolidated with the Bennington & Rutland Railroad Company of Vermont, and the new corporation took the name of the Harlem Extension Railroad Company.

This latter company, in April, 1870, made its mortgage to the Union Trust Company of New York, in trust to secure the payment of \$4,000,000 of its bonds, but only \$1,400,000 of this issue were negotiated.

In February, 1872, the Union Trust Company began the foreclosure of the first-named mortgage in the supreme court of New York, and later in the same year it filed bills in the court of chancery in Vermont to foreclose both mortgages in that jurisdiction.

In December, 1872, and while the suits mentioned were pending, the Harlem Extension Railroad Company consolidated with corporations, not material to mention in this connection, and assumed the name of the New York, Boston & Montreal Railway Company.

In January, 1873, the property covered by the \$2,000,000 mortgage in this state was sold and conveyed, in the Union Trust Company foreclosure suit, to James C. Hull, a clerk in the office of defendant William Butler Duncan, for the nominal sum of \$100,000, and about the same time there were sales under the Vermont decrees, and conveyances executed to Charles G. Lincoln, a clerk for one Trenor W. Park, for the nominal sum of \$50,000.

It is found in this action that the Union Trust Company never did anything to enforce the payment of these bids, and that they were never paid.

On the 28th of January, 1873, Hull and Lincoln, without any consideration, executed to the defendant William Butler Duncan and one Trenor W. Park a bond for the payment of \$5,000,000, secured by mortgage covering the property con-

veyed to them under the foreclosure sales in New York and Vermont.

It is found in this action that both Duncan and Park knew that the consideration for the deeds to Hull and Lincoln remained unpaid. On the 30th of January, 1873, Hull and Lincoln conveyed the property without consideration, and subject to the Duncan and Park mortgage, to the New York, Boston & Montreal Railway Company.

The \$5,000,000 mortgage made to Duncan and Park represented substantially the aggregate indebtedness which the New York, Boston & Montreal Railway Company was to assume under the consolidation and other agreements.

The latter company paid to Duncan and Park \$807,077.05 on account of the money due on said mortgage, but failed to pay the balance, became insolvent, and in April, 1875, Daniel Butterfield was appointed, by the supreme court of the state of New York, receiver of all its property and effects.

During the year 1873 the New York, Boston & Montreal Railway Company executed to Seligman, Sherman & Brown a mortgage to secure bonds to the aggregate amount of \$12,250,000; also another mortgage to the New York Loan & Indemnity Company to secure the payment of additional bonds to the aggregate amount of \$12,750,000.

A sufficient amount of these bonds were sold in Europe to realize \$6,000,000.

In November, 1873, the New York, Boston & Montreal Railway Company leased its road to the Central Vermont Railway Company, which lease was operated until August 20, 1877, when it was abandoned.

In the meantime the lessor company had become insolvent, as already stated, and in September, 1877, one Russell C. Root took possession of the property without legal right, and subsequently, on November 27, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company.

Root, in the name of this company, and as its president, continued to operate the road until possession was taken from him by the court, as will presently appear.

In September, 1880, one Marvin Sackett, a bondholder of the Lebanon Springs Railroad Company, brought an action in the supreme court of New York against Russell C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston & Montreal Railway Company, and Daniel Butterfield as its receiver. Sackett alleged in his complaint that he brought the action "in behalf of himself and all other bondholders of the Lebanon Springs Railroad Company similarly situated, who hold any of the two

millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit."

The complaint further alleged the mortgage to secure plaintiff's bonds to the Union Trust Company of New York, the action to foreclose, the sale there under, and the non-payment of the purchase-money to the trustee.

In brief, the Sackett suit was ostensibly a representative action for the benefit of bondholders, and sought, apparently, to charge Duncan, and his clerk, Hull, who took title at the foreclosure sale in this state, as trustees for the bondholders. The complaint further prayed for a receiver, a sale of the property, that all titles under the foreclosure sale should be declared void, and for such other relief as was just.

It will be observed that while the Sackett suit professed to seek the objects indicated, it failed to bring before the court the necessary parties to render such a decree as was prayed for binding, viz. the Union Trust Company of New York, Duncan, Park, Hull, Lincoln, and the trustees under the mortgages.

The record in the Sackett suit also discloses some other remarkable features.

In October, 1880, John Van Valkenburgh was appointed receiver. Intermediate the appointment of the receiver and February 1, 1881, holders of large amounts of both Lebanon Springs and Harlem Extension bonds petitioned the court in two separate proceedings to be made parties to the action, but both applications were denied. After the denial of these motions, and in February, 1881, the receiver petitioned for instructions, and suggested that he issue certificates to be made a first lien for, among other things, the "settlement of unavoidable indebtedness of the company now existing." April 2, 1881, after the coming in of the report of an expert to examine the railroad, and no one appearing except the receiver's counsel, the receiver was ordered to issue certificates of indebtedness to the amount of \$350,000, and a referee was appointed "to hear and determine all existing claims against said Lebanon Springs Railroad Company." The receiver had previously borrowed \$25,000 without authority of the court. The disposition made of a portion of the proceeds realized by the sale of the receiver's certificates will be considered later.

The Sackett suit did not reach final judgment until January, 1885, after a delay of between four and five years. Later in 1885 the referee, under the judgment, sold the property to William Foster, Jr., for \$155,000.

The action at bar was begun in the supreme court of New

York, April, 1887, by bondholders owning bonds of both the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company.

The complaint brings in all the parties in interest. It seeks to enforce the foreclosure judgments and decrees of 1872 in the suits instituted by the Union Trust Company of New York both in Vermont and this state. It is also in the nature of a bill of review of the judgment in the Sackett suit, and a bill for relief against the judgments and proceedings in that suit as fraudulent. It also seeks the foreclosure of all junior liens.

The special term, on November 10, 1891, rendered a judgment for the plaintiffs in this action. A sale of the property was made by the referee, and on the 16th of May 1892, William Foster, Jr., received a deed as purchaser.

This judgment was affirmed by the general term of the Third department.

It now becomes necessary to consider the manner in which this appeal is presented.

In 1886, and before the case at bar was begun, one of the defendants in this action, the Central National Bank of Boston, on behalf of itself and all other holders of the receiver's certificates issued under the judgment in the Sackett suit, brought an action in the supreme court of New York against Foster and Hazard, the purchasers under the Sackett judgment, and a corporation called the New York, Rutland & Montreal Railway Company, their grantee. The complaint in this action recited in detail the proceedings in the Sackett suit which led to the issuing of receiver's certificates, alleged that the Central National Bank of Boston held \$250,000 par value of the same, and that the balance of certificates were owned by divers persons and corporations.

It was also alleged that Hazard and Foster, when purchasing under the Sackett judgment, had assumed and agreed to pay the amount of unpaid principal and interest on said certificates of indebtedness after application of the purchase-money.

It prayed that the certificates be declared a first lien on the property; that a receiver be appointed, property sold, and Hazard and Foster adjudged to pay deficiency. This suit was removed into the United States circuit court on petition of the defendants on ground of citizenship of parties.

On the 24th of March, 1887, a decree was entered in favor of plaintiffs, and a sale of the property ordered. Within 30 days after the entry of this decree the action at bar was begun, and proceeded to judgment before sale under the federal decree, which did not take place until 1892.

The defendants appealing from the judgment in the action at bar are the certificate holders, and the only questions presented are on their behalf.

It is urged by the learned counsel for the appellants that the judgment appealed from is erroneous in perpetually enjoining the appellants from proceeding with the sale of the premises under the decree of the circuit court of the United States; also in authorizing the referee to determine who were the owners of receiver's certificates; also on the merits and that the motion to dismiss the complaint should have been granted.

Power of state
court to re-
view judg-
ment of
federal court.

The appellants' counsel insists that this case presents a conflict of jurisdiction between the state and federal courts, and that the injunction clause of the judgment, which perpetually enjoined and restrained the Central National Bank of Boston and other certificate holders from proceeding with the sale under the United States circuit court decree, was an unlawful interference with the due and orderly procedure of a suit in which the federal court had first acquired jurisdiction of the subject-matter.

We have been cited to many cases in the state and United States courts dealing with this question of concurrent jurisdiction, and declaring well-settled principles that govern the procedure under such circumstances.

We do not consider that such a question is presented in this case, but are of opinion, assuming that the Sackett suit is fraudulent, that it was competent for the supreme court of New York in the action at bar to bring before it all the parties in interest, and to review the judgment in the Sackett suit, to vacate it as fraudulent, and to deal as a court of equity with the holders of the receiver's certificates issued under the Sackett judgment. It must be admitted that the United States circuit court had jurisdiction of the subject-matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that attacks the jurisdiction of the United States circuit court, or questions the legality of its decree.

The suit in the United States circuit court was founded upon the judgment and orders in the Sackett suit, and sought, as against the defendants therein, to enforce their provisions, and to secure to the certificate holders those rights as to priority of lien and personal judgment against Hazard and Foster, to which the Sackett judgment entitled them.

It was after the decree of the United States circuit court was rendered that the supreme court of New York, sitting as a court of equity, assumed jurisdiction of all the parties con-

nected with this long and complicated contest, and undertook to adjust their rights and interests.

In so doing it rendered its judgment, reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate holders from proceeding with the sale under the United States circuit-court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject-matter, it must restrain the certificate holders from proceeding with the sale under the decree of the United States circuit court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. Unless this power existed in the supreme court of the state of New York, it was powerless to adjust the conflicting interests submitted for its consideration.

We think it is clear, both upon principle and authority, that this power did exist, and that the sale under the decree of the United States circuit court was without force or effect

Injunction by state court. as to the parties in that suit, as they proceeded in violation of the injunction contained in the judgment at bar. The setting aside of the judgment in

the Sackett suit; upon which the suit in the United States circuit court was founded, for fraud, was a new fact occurring since the decree in that court, which gave jurisdiction in this action to enjoin proceedings thereon.

Judge STORY (2 Eq. Jur., 13th Ed., § 899) uses this language in regard to foreign courts, but it is equally applicable to state and federal courts, viz. :

"Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit.

"In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction.

"They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties and decree *in personam* according to those equities, and enforce obedience to their decrees by process *in personam*."

This is the acknowledged rule in England and this country. In the case of *Barry v. Brune*, reported below in 8 Hun, 395, and affirmed by this court (71 N. Y. 262), this rule was acted

upon, and the supreme court of this state enjoined the parties before it from collecting a judgment recovered in the United States circuit court for the district of Maryland. See, also, *Mead v. Merritt*, 2 Paige, 404; *Dehon v. Foster*, 4 Allen, 550; *Savage v. Alen*, 54 N. Y. 458; *Railroad Co. v. Haws*, 56 N. Y. 175; *Railroad Co. v. Schuyler*, 17 How. Pr. 464, 468; *Iron Co. v. McClaren*, 5 H. L. Cas. 439, and English cases there cited.

Passing from this point, it should be remembered that the suit of the Central National Bank of Boston was begun in the supreme court of New York, and was removed into the United States circuit court on the ground of citizenship of parties.

All that can be claimed for the decree of the latter court is that it be accorded the same force and effect as a similar judgment of the supreme court of New York. *Dupasseur v. Rochereau*, 21 Wall. 130, 135; *Crescent City Live-stock Co. v. Butchers' Union Slaughter-house*, 120, U. S. 141, 147. It cannot be doubted that if the Central National Bank of Boston had proceeded to judgment in the supreme court of New York the judgment in the case at bar would have dealt with that judgment precisely as it did with the decree in the United States circuit court.

We will now consider the disposition of this case by the court below on the merits.

An examination of the evidence satisfies us that the findings of fact are abundantly sustained.

The fifth and sixth findings of fact are to the effect that the suit of Sackett was neither brought nor conducted for the purpose of realizing the property to the owners of the Lebanon Springs bonds, but that it was brought and conducted for the purpose of realizing out of the property certain individual claims of Sackett and Tilden in preference to, and at the expense of, the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property, and were behind the mortgage. It appears that these claims exceeded \$30,000, and the aggregate fees of counsel and receiver were about \$61,000, all of which were paid out of the proceeds realized by the sale of receiver's certificates.

Fraudulent
nature of pro-
ceedings.

The failure to bring in the necessary parties in order to render binding any judgment that might be obtained in the Sackett suit is sufficient of itself to stamp the entire proceeding as colorable and fraudulent. There was in fact no real contest, and the rights of bondholders were ignored.

The absence from the record of the Union Trust Company of New York, of Park, Duncan, Hull, Lincoln, and the trustees under the other mortgages than those represented by the Union Trust Company, renders the Sackett suit a legal ab-

surdity. *Railroad Co. v. Nolan*, 48 N. Y. 513; *Hallett v. Hallett*, 2 Paige, 15-22.

We do not deem it necessary to discuss in detail the legal points raised attacking the jurisdiction of the court and the form of the action.

We think this suit is maintainable under established principles of equity jurisprudence.

The rule is well settled that courts will set aside as a nullity a judgment, decree, or award obtained by fraud. *Hackley v. Draper*, 60 N. Y. 88; *State of Michigan v. Phoenix Bank*, 33 N. Y. 9; *Dobson v. Pearce*, 12 N. Y. 156; *Wright v. Miller*, 8 N. Y. 10; *Whittlesey v. Delancy*, 73 N. Y. 571; *Tiernan v. Wilson*, 6 Johns. Ch. 411; *Campbell v. Railroad Co.*, 1 Woods, 368, Fed. Cas. No. 2366.

This action was promptly begun within two years after the sale in the Sackett suit, and is to be regarded as a bill for relief against the Sackett judgment and all proceedings in that suit as fraudulent. It is not necessary to consider it as strictly a bill of review, nor to discuss the law bearing upon suits of that nature.

The action was properly and seasonably brought.

There is the further question whether the certificate holders have any just ground to complain of the judgment as entered.

By its provisions, a referee was appointed to ascertain who were the owners of the Lebanon Springs bonds, and which of the bonds were actually in the Sackett suit. It further provided that the referee to sell should pay the net amount realized to the Lebanon Springs bondholders, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit he should pay so much thereof to the holders of the receiver's certificates, and the balance, if any, to the holders of such bonds.

The bondholders of the Lebanon Springs Railroad Company duly represented in the Sackett suit were, of course, bound by the order and judgment authorizing the issue of certificates. The remaining bondholders were in no way affected by the judgment.

It is therefore apparent that the certificate holders have been as fully protected by the judgment in the case at bar as was possible. There are no exceptions that should lead to reversal.

The judgment appealed from should be affirmed, with costs. All concur, except GRAY, not voting.

Judgment affirmed.

CUNNINGHAM *et al.*

v.

MACON & BRUNSWICK R. Co.

(156 *United States*, 400.)

Endorsement of Railroad Bonds by State—Rights of Holders of Bonds Subsequently Endorsed by State After Sale of Road on Default in Prior Bonds Endorsed.—By the Georgia act of 1866, page 127, the state loaned its credit to a railroad company by endorsing the bonds of the latter, which act also provided that such endorsement should operate as a prior lien or mortgage upon all the property of the company. The constitution adopted in 1868, provided that the state should not grant or loan its credit to aid any company unless the whole property of the corporation should be bound for the security prior to any other indebtedness, with certain exceptions. In 1870 (acts 1870, page 336) an act was passed purporting to amend the act of 1866, and authorizing the governor to place the endorsement of the state upon additional bonds of the company, and thereafter such additional bonds were issued, endorsed by the state, and sold. In 1873, the company made default in payment of the bonds of 1866, and its property was taken possession of for the benefit of the state. Subsequently (in 1875) the legislature declared the bonds of 1866 to be valid and binding obligations of the state, but that the bonds issued under the act of 1870 were unconstitutional, null, and void, and in the same year, the state sold the mortgaged property, being itself the purchaser, for the sum of \$1,000,000. The bonds of 1866 having been retired, the holders of the bonds of 1870 brought suit to set aside the sale, but the bill was dismissed upon the ground that inasmuch as the state was a necessary party it could not be sued without its consent. Thereafter the state sold the property for \$1,250,000, and the holders of the bonds of 1870 filed a supplemental bill against the purchasers of the road, seeking to impress the property in their hands with the trust, charging that the state had been the trustee of complainants for the purpose of enforcing their equitable rights, and that it had been guilty of a breach of trust in selling the property for less than its value. *Held*, that the complainants were not entitled to be subrogated to the security taken by the state under the act of 1866 by way of mortgage, nor to enforce such mortgage by reason of such subrogation, since the state had divested itself of all its rights by selling the mortgaged premises, and by applying the proceeds to the payment of the debt which the mortgage was given to secure, and no longer had any rights of its own, and that therefore no subrogation could be derived through it; also, that the state being a necessary party to the enforcement of the subrogation, it could not, without its consent, be impleaded.

Same—Rights of Holders of Bonds First Endorsed.—If the statutory mortgage created by the act of 1866 was solely for indemnification of the state, and not for the security of the bondholders, the latter, whatever might be their indirect rights by subrogation, could not avail themselves of the statutory mortgage.

Constitutionality of Act Authorizing Endorsement of Bonds by State and Amending Prior Act—Effect of Intermediate Amendment of Constitution Prohibiting Loan of Credit by State.—The holders of the bonds of 1870 contended that the act authorizing the issue of those bonds being an amend-

ment of the act of 1866, its provisions as to the mortgage became incorporated in the act of 1870. *Held*, that, assuming this contention to be correct, the latter act would be a violation of the constitution as amended in 1868 prohibiting the loan of the credit of the state.

Same—Impairment of Obligation of Contracts.—Assuming that the incorporation of the provisions of the act of 1866 into the act of 1870 made the bonds issued under the latter act equal in rank with the bonds issued under the former act, the latter act of 1870 would be void as impairing the obligation of the contract entered into with the holders of the bonds of 1866.

Effect of Sole Interest of State in Mortgage Security.—Assuming that the mortgage created by the act of 1866 was in favor of the state and not in favor of the bondholders; that the issuance of the bonds of 1870 simply increased the aggregate amount of the state's liability; that there was no difference between the two mortgages in rank because of the holding by the state of both series, and that the issue of the two were practically under one act, which would be in effect an assertion that the statutory mortgage created by the act of 1866 was solely for the benefit and indemnification of the state, and that the holders of the bonds were not directly interested therein, the contention if correct would defeat the complainants.

Right of State to Indirectly Violate Constitution.—The state having a first-mortgage security which it had taken to secure bonds of which it was an endorser, could not vitiate such security by allowing others to participate in the benefits thereof, and thus do by indirection what the constitution forbade it to do directly.

Duty of Holders of Bonds of Second Series to Protect Themselves by Payment of Prior Indebtedness.—The property of the company having been for nearly two years under seizure for default in the payment of the bonds of 1866, it was the plain duty of the holders of the second issue of bonds, if they were interested in preventing a sale, and wished to tender their bonds in payment, to bid a sufficient amount to lift the prior encumbrance.

Validity of Purchase by State at its own Sale—Georgia Doctrine.—The sale was not void for the reason that the purchase by the state was at its own sale as trustee, since it is the settled doctrine in Georgia that the purchase by a trustee at his own sale is not absolutely void, but merely voidable at the option of the *cestui que trust*.

APPEAL from the United States circuit court for the southern district of Georgia.

The Macon & Brunswick Railroad Company was chartered by the legislature of Georgia in 1856. Acts 1856, p. 181. In

Case stated. December, 1866 the legislature of the state authorized the governor to endorse the bonds of the road to the extent of \$10,000 per mile. The act reads as follows: "An act to extend the aid of the state to the completion of the Macon and Brunswick Railroad, and for other purposes.

"Whereas the Macon and Brunswick Railroad has been completed to the distance of fifty miles from the city of Macon, and is thoroughly equipped, and daily trains are running thereon, and seventy miles additional are graded and ready for the superstructure; and whereas its completion to Brunswick would greatly inure to the benefit of the state in developing its agricultural, commercial, and manufacturing interests; and whereas, by reason of the financial embarrassments re-

sulting from the late war, the stockholders of said railroad are unable to supply the capital necessary to the completion of this great work:

“Section 1. Be it enacted, etc., that his excellency, the governor, be and he is hereby authorized to place the endorsement of the state on the bonds of the Macon and Brunswick Railroad Company which said company may issue, to the amount of ten thousand dollars per mile for as many miles of said road as are now completed, and the like amount per mile for every additional ten miles, as the same may be completed and placed in running order, on the following terms and conditions, to wit: Before any such endorsement shall be made the governor shall be satisfied that as much of the road as the said endorsement shall be applied for is really finished and in complete running order, and that said road is free from all liens, or mortgages, or other incumbrances, which may in any manner endanger the security of the state; and upon the further condition and express understanding that any endorsement of said bonds, when thus made, shall not only vest the title to all property of every kind which may be purchased with said bonds in the state, until all the bonds so endorsed shall be paid; but the said endorsement shall be, and is hereby understood to operate as a prior lien or mortgage on all of the property of the company, to be enforced as hereinafter provided for.

“Sec. 2. In the event of any bond or bonds endorsed by the state, as provided in the first section of this act, or the interest due thereon, shall not be paid by said railroad company at maturity, or when due, it shall be the duty of the governor, upon information of such default by any holder of said bond or bonds, to seize and take possession of all the property of said railroad company, and apply the earnings of said road to the extinguishment of said bond, or bonds, or coupons, and shall sell the said road and its equipments, and other property belonging to said company in such manner and at such time as in his judgment may best subserve the interest of all concerned.” Acts 1866, p. 127.

Under this authority the governor endorsed the bonds of the company to the extent of \$1,950,000. The bonds were thus entitled:

“State of Georgia.

“United States of America.

“Macon & Brunswick Railroad Company.
First and Only Mortgage Bond.”

They acknowledged that the Macon & Brunswick Railroad Company was indebted to Charles J. Jenkins, as governor of

Georgia, and to his successors in office, or to the bearer thereof; and also recited the statutory mortgage, which was reserved by the state in the act of 1866. In June, 1870, the president of the railroad company executed an instrument in which he stated that these bonds had been issued in conformity with the statute, and that the company was desirous of confirming the lien held by the state to secure their payment, and that, therefore, he, as president, recognized, on behalf of the company, the validity of the statutory mortgage and of the lien created thereby. To this instrument the state was not a party. In October, 1870, the legislature of Georgia passed the following act:

"An act to amend an act to extend the aid of the state to the completion of the Macon and Brunswick Railroad, and for other purposes.

"Whereas the Macon and Brunswick Railroad has been completed to Brunswick, requiring a greater outlay of money than was originally contemplated, to place the same in complete running order, and to furnish the necessary cars, engines, and machinery; and whereas the state has, by recent legislation, endorsed the bonds of other railroads to the extent of fifteen thousand dollars per mile:

"Section 1. The general assembly of the state of Georgia do enact, that the above-recited act be so amended as to authorize the governor to place the endorsements of the state, to the extent of three thousand dollars per mile, upon the bonds of said Macon and Brunswick Railroad Company, in addition to ten thousand dollars, as recited in the act of which this is amendatory.

"Sec. 2. Be it further enacted, that all laws and parts of laws in conflict with this act be, and the same are, hereby repealed." Acts 1870, p. 336.

Under this act bonds to the extent of \$600,000 were issued by the railroad and indorsed by the state. These bonds differed in several particulars from those of the first issue. Thus, instead of acknowledging that the corporation was indebted to the governor of the state, they declared that it was indebted to Morris K. Jesup, of the city of New York, or bearer. They made no reference to the mortgage or lien held by the state under the act of 1866, nor did they purport to be secured by mortgage. Each of them contained this recital: "This is one of a series to the extent of \$3,000 per mile of the Macon and Brunswick Railroad Company, indorsed by the state of Georgia in accordance with an act of legislature passed October 27, 1870." At the time this act was passed the constitution of Georgia contained the following provision:

"The general assembly shall pass no law making the state a

stockholder in any corporate company; nor shall the credit of the state be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the state prior to any other debt or lien, except to laborers; nor any company in which there is not already an equal amount invested by private persons; nor for any other object than a work of public improvement." Const. 1868, art. 3, § 6, subsec. 5.

In August, 1872, the legislature of Georgia passed a resolution declaring that the state's guarantee placed on the bonds of the Macon & Brunswick Railroad Company was binding. In 1873 the company defaulted in the payment of interest on the bonds issued under the act of 1866, and which bore the state's indorsement. In July of that year the governor issued a proclamation reciting the passage of the act of 1866, the issue of the bonds thereunder, and the company's default. He announced also that, in pursuance of the power conferred upon him by that act, he had seized the company's property, and had appointed an agent to the state to take possession and control of the same. In March, 1875, the legislature passed a resolution declaring that the \$1,950,000 issue of bonds which had been indorsed under the act of 1866 were valid and binding obligations of the state, but that the \$600,000 issue under the act of 1870 was unconstitutional, null, and void; that it was the sense of the general assembly that the railroad, with its franchises, equipments, and appurtenances, should be sold by the governor at an early date, and, if considered practicable, as early as June 1, 1875, at public or private sale, and upon such terms, and for such a price in money or first-mortgage indorsed bonds of the Macon & Brunswick Railroad Company, or bonds of the state, as, in his judgment might be consistent with the interests of the state, and that no commission or percentage should be authorized or allowed under such sale.

In April, 1875, the governor issued his executive order for the sale of the railroad property which had been under seizure since 1873. This order, after also reciting the act of 1866, and the indorsement by the state of the bonds issued thereunder, proceeded as follows:

"Whereas, among other provisions of said second section of said act, it is expressly provided that after the seizure of all the property of said company, as aforesaid, the governor 'shall sell the road and its equipments and other property belonging to said company, in such manner and at such times as, in his judgment, may best subserve the interest of all concerned;' and having become satisfied that it will be for the best interest of the state and all concerned that all the

property of the company seized under said order be sold at an early day, it is therefore

"Ordered, that all the property seized, as aforesaid, now in the possession of Edward A. Flewellen, receiver of the property of the Macon & Brunswick Railroad Company, under said order, be sold to the highest bidder at public outcry at the depot of the Macon & Brunswick Railroad Company, in the city of Macon, between the hours of 10 o'clock A.M. and 4 o'clock P.M. on the first Tuesday in June next.

"The said sale will be made for cash, for bonds of this state, or the first-mortgage bonds of the company, indorsed in behalf of the state, under the authority of the act approved December 3, 1866. It is further

"Ordered, that the said Edward A. Flewellen, as receiver aforesaid, make out an advertisement under this order, setting forth with requisite particularity all the property to be sold as aforesaid, and publish the same in such public gazettes in this state and in the city of New York as, in his judgment, will give proper publication to said sale."

The sale thus directed took place on the date fixed, and the property was bought in by the governor, on behalf of the state, for \$1,000,000, the purchase having been authorized by the legislature of the state. The governor executed a formal conveyance of the purchase to the state on June 3, 1875, and the state subsequently retired the \$1,950,000 of bonds which had been issued and indorsed under the act of 1866. In September, 1877, the complainants (appellants), alleging themselves to be holders and owners of bonds of the Macon & Brunswick Railroad Company, indorsed by the state under the act of 1870, which, they averred, they had acquired in open market after the state had acknowledged her liability thereon, and before the passage of the act declaring the indorsement invalid, filed their bill in the circuit court of the United States for the southern district of Georgia against the company and certain persons named therein, "styling themselves directors of the Macon & Brunswick Railroad," and J. W. Renfro, treasurer, and Alfred H. Colquitt, governor, of Georgia. This bill, after setting out the facts substantially as here given, charged that the sale made by the governor was void for the following reasons:

"(1) Because neither the legislature nor the governor had the right to exclude the \$600,000 series of indorsed bonds from being used as so much cash in the purchase of said road at their face value. Certainly they were entitled to be so used in the event of the exhaustion of the \$1,950,000, which themselves should have ——— received as cash at par.

"(2) Because the governor was not authorized to bid on

said property for the state, and the state had no constitutional power to make the purchase, or, if said sale is not void, it is certainly voidable, because under the statutory and executed mortgages the state is the trustee of the property mortgaged for the benefit of the bondholders, and had no right to buy at her own sale as such trustee, without incurring the risk of having such sale set aside at the instance of any beneficiary under the trust; and your orator as such beneficiary elects to set said sale aside."

The bill also alleged the taking up by the state of the \$1,950,000 of bonds issued under the act of 1866, subsequent to her purchase of the property, and averred, in the alternative, that, if the sale was not void because of the fact that the mortgage was solely to indemnify the state, then the holders of the bonds issued under the act of 1870 were entitled to a ratable distribution of the proceeds with the holders of those indorsed under the act of 1866, and therefore should receive an equal *pro rata* share of all sums paid or to be paid by the state on the retired issue of \$1,950,000 under the act of 1866. The bill was demurred to by Renfroe, treasurer, and Colquitt, governor, and, after hearing, was dismissed. The complainants thereupon prosecuted their appeal to this court, where the decree below was affirmed. *Cunningham v. Railroad Co.*, 109 U. S. 446, 3 Sup. Ct. 292, 609. Meanwhile, subsequent to the decree of dismissal below, the railroad and its appurtenances were sold by the state, under proper legislative authority, for \$1,250,000, and through a series of transfers, some of them being the result of judicial foreclosure of mortgages, the road finally became the property of the East Tennessee, Virginia & Georgia Railroad Company. In 1886, after the filing of the mandate of this court, affirming the decree of dismissal, a motion was made below for a decree *pro confesso* against the Macon & Brunswick Railroad Company, and leave was given to file a supplemental bill making the East Tennessee, Virginia & Georgia Railroad Company a party defendant. The amended bill was duly filed. This bill, after substantially reiterating the averments of the original bill, and charging likewise that the sale at which the governor bought in the property on behalf of the state was null and void, alleged that the East Tennessee, Virginia & Georgia Railroad Company was a purchaser with notice of the illegality, and then proceeded as follows:

"And your orator charges that the said state of Georgia held the said property, after the seizure thereof, as a trust for the payment of the obligations of the said the Macon & Brunswick Railroad Company to the extent of the avails of a sale of the said property to be made for the interest of all

creditors of said company, with the privilege unto the said state of protection, first, out of said avails, of its own indorsement of the bonds of said company; that the said state, in and by the resolution aforesaid, declared its indorsement of the bonds held by your orator to be not binding on it, and in advance of demand upon it by your orator refused thereby to pay the said endorsement, or to enforce its said privilege of protection of said indorsement from the avails of said property so in its hands; that your orator thereby became at least entitled to the advantage of the said mortgage lien of the said state for his protection, to have the said property sold with proper regard to his interests and the interests of his fellow bondholders, to be allowed to participate freely with all other lienors of the said railroad at the sale of the said railroad property by his said trustee in bidding upon said property, and paying therefor in the bonds held by him, hereinbefore mentioned, with due regard to the protection of any and all prior liens and the costs and expenses of sale.

“And your orator shows that in and by the said resolutions under which said sale was made, and under color of which the said trustee for your orator became possessed of the said railroad property, the said state of Georgia gave notice of its intention to commit a breach of trust by excluding your orator from participation in said sale on equitable terms with the holders of the first-mortgage bonds, by excluding your orator, by the provisions thereof, from participation in the avails of said sale or any benefit therefrom by announcing openly to the world its intention to sell the said road in its own interest rather than in the interest of the creditors of said company, and by divers other acts and announcements, all concurring to demonstrate positively to the world that the said trustee had determined to exclude your orator from any benefit under the said trust, and that it would not regard or protect in any respect the interests of your orator and his fellow bondholders in the said sale or distribution of avails.

“And your orator shows that in point of fact the said state of Georgia, at the said sale, did commit the said breach of trust according to its previously-announced intention, did exclude your orator and his fellow bondholders from their rights of equitable protection at sale by bidding and paying the bonds held by them, did sell the said road in a manner contrary to the interests of the creditors generally of the said road for a very small part of its real value, the price nominally bid therefor being one million dollars, and the real value thereof being four million dollars, and did sell the road to itself for said price, in its own interest, and without regard to the interests of the beneficiaries of the trust, including

your orator, and thereupon, in equity, held the said property as a trust for your orator, and subject to his lien for the payment of his said bonds.

"And your orator avers that the said the East Tennessee, Virginia & Georgia Railroad Company and the East Tennessee, Virginia & Georgia Railway Company had full notice in the purchase of said property made by each of the said breach of trust by said trustee, and took the said property subject to the duties and liabilities of said trustee towards your orator,—that is to say, with the lien of your orator unaffected and undischarged by the sale of said property made by said trustee in breach of his fiduciary duty,—and that the said last-mentioned company now holds said property as trustee for your orator, and subject to your orator's lien for the payment of the said indebtedness to him."

The East Tennessee Company answered the supplemental bill, stating the various conveyances through which the title had finally come to be vested in itself, and asserting the validity thereof. All the facts above stated appear on the face of the pleadings and exhibits. Before the sale was made by the state, John P. Branch, a holder of bonds of the same series as those held by these complainants, had filed a bill in the circuit court of the Southern district of Georgia, asking for an injunction to prevent the sale, but the application was denied. *Branch v. Railroad Co.*, 2 Woods, 385, Fed. Cas. No. 1808. Branch had also taken a decree *pro confesso* against the Macon & Brunswick Railroad Company, and he was allowed to intervene below, and become a party to the present suit, in which he claims the same rights as those asserted in the original and supplemental bill. The cause was submitted to the court on bill, answer, and exhibits, and resulted in a decree of dismissal. The case was then brought here by appeal.

Chas. N. West, W. W. Montgomery, D. H. Chamberlain, and John Howard, for appellants.

• *George Hoadly*, for appellees.

Mr. Justice WHITE, after stating the case, delivered the opinion of the court.

The case of the appellants rests upon two distinct legal propositions. The first one asserts their right to be subrogated to a mortgage security taken by the state of Georgia, and, by virtue of such subrogation, to enforce the mortgage against the property of the railway company. The other proposition is that they are direct mortgage creditors, and have a specific mortgage lien upon the property of the company. Subrogation.

A right of subrogation, such as is here claimed by the appellants, does not involve any direct lien in favor of the creditor, resulting from his position as such. It only exists in consequence of his being, as a creditor, entitled to enjoy certain rights which are vested in the surety at the time the subrogation is claimed. This principle is fundamental, and its application is fatal to the complainants. As the creditor's right to subrogation depends on the existence, in the surety, of the rights to which subrogation is sought, it follows that, after the surety has parted with the thing given him for his protection, the creditor can have no subrogation to such thing. In the present case, when the subrogation is claimed, the state had divested herself of all her rights, under the mortgage of indemnity, by selling the mortgaged premises, and had applied the proceeds of the sale to the payment of the debt which the mortgage was given to secure. She had no longer any rights of her own, therefore no subrogation could be derived through her. Aside from this consideration, in order to enforce equitable subrogation against a surety, he must be made a party to the cause. The state of Georgia is not, and cannot be, without her consent, impleaded. All the foregoing doctrine was applied and carefully stated in *Chamberlain v. Railroad Co.*, 92 U. S. 299, where, speaking through Mr. Justice FIELD, the court said: "Whatever right the plaintiff had to compel the application of the lands received by the state to the payment of the bonds held by him, it was one resting in equity only. It was not a legal right arising out of any positive law, or any agreement of the parties. It did not create any lien which attached to and followed the property. It was a right to be enforced, if at all, only by a court of chancery against the surety. But the state being the surety here, it could not be enforced at all, and, not being a specific lien upon the property, cannot be enforced against the state's guarantees. Where property passes to the state, subject to a specific lien or trust created by law or contract, such lien or trust may be enforced by the courts whenever the property comes under their jurisdiction and control. Thus, if property held by the government, covered by a mortgage of the original owner, should be transferred to an individual, the jurisdiction of the court to enforce the mortgage would attach, as it existed previous to the acquisition of the government. *The Siren*, 7 Wall. 158, 159. But where the property is not affected by any specific lien or trust in the hands of the state, her transfer will pass an unincumbered estate."

The appellants must therefore rely for the maintenance of any rights they may possess upon their second proposition,

which is to the effect that the bonds which they hold were secured by the statutory mortgage created by the act of 1866, and that the mortgage rights thus existing were not affected by the sale made by the state in 1875, but are yet subsisting, and may be enforced against the mortgaged property in the hands of the present defendant. It is obvious that, if the statutory mortgage created by the act of 1866 was solely for the indemnification of the state, and not for the security of the bondholders, the latter, whatever may be their indirect rights by subrogation, cannot directly avail themselves of the statutory mortgage. *Chamberlain v. Railroad Co.*, 92 U. S. 299; *Tennessee Bond Cases*, 114 U. S. 663. In order, therefore, to give them the relief which they seek, the statutory mortgage must be treated as having been given to secure the holders of the bonds. But if this view be taken, the claim here asserted is untenable. If there be a mortgage in favor of complainant's bonds, it must result from the terms of the act of 1866; but these bonds were not issued under that act, and owe their existence to the authority conferred by the act of 1870. This act reserved no mortgage, and the bonds of relator, having been issued under it, do not purport to be secured by mortgage. The claim that they are so secured is deduced from this contention: The act of 1870, it is asserted, purported to be an amendment to the act of 1866; therefore the provisions as to mortgage found in the act of 1866 were incorporated into and became a part of the act of 1870. Between 1866 and 1870, however, the following amendment to the constitution of Georgia was adopted, and it was in force when the act of 1870 was passed.

Rights of
holders of
bonds of 1870.

"The general assembly shall pass no law making the state a stockholder in any corporate company; nor shall the credit of the state be granted or loaned to aid any company without a provision that the whole property of the company shall be bound for the security of the state, prior to any other debt or lien, except to laborers; nor any company in which there is not already an equal amount invested by private persons, nor for any other object than a work of public improvement."

Under these provisions, if we were to construe the act of 1870 as desired, the result would be to make that act clearly violate the amendment to the constitution just cited; for, if the statutory mortgage secured the bondholders, then the bonds issued under the act of 1866 were necessarily secured by a first mortgage, and those issued under the act of 1870 by a second. This conclusion can be avoided only in one or the other of two ways: First. By contending that the incorporation of the pro-

Constitution-
ality of act of
1870.

visions of the act of 1866 into the act of 1870 made the bonds issued under the latter act equal in rank of mortgage with the bonds issued under the former. But to admit this contention would make the act of 1870 void, because it would, if thus construed, impair the obligations of the contract made with the holders of the bonds first issued. Or, second, by contending that, inasmuch as the mortgage created by the act of 1866 was in favor of the state, and not in favor of the bondholders, the issuance of the bonds of the second series simply increased the aggregate amount of the state's liability, and that there was no difference between the two in rank of lien and mortgage, since the state held both the first and second series, and the two were practically issued under one act. But this would be an assertion that the statutory mortgage created by the act of 1866 was solely for the benefit and indemnification of the state, and that the holders of the bonds were not directly interested therein. If this position be assumed, it defeats the complainants, as we have already seen.

However, it is claimed that, even if the state's indorsement of the bonds issued under the act of 1870 was in violation of the constitutional amendment, the only result is to render the indorsement void, and thus the bonds are left outstanding as valid contracts of the railroad company, secured by the statutory mortgage reserved in the act of 1866. This contradicts the plain text of that act, since it only purported to reserve a mortgage in favor of bonds indorsed by the state. And, besides, if this argument were adopted, it would render efficacious a legislative violation of the constitutional amendment, since it presupposes that there was power in the general assembly to allow the mortgage security, which had been taken by the state solely in order to secure the bonds which she had guaranteed, to be transferred to others as a means of securing bonds to which her guarantee could not be constitutionally affixed. In other words, that the state, having a first-mortgage security, which she had taken to secure bonds, of which she was an indorser, could vitiate such security by allowing others to participate in the benefits thereof, and thus do by indirection what the constitution forbade her to do directly.

Nor does the case of *Railroad Cos. v. Schutte*, 103 U. S. 118, sustain this argument of the appellants. There the state of Florida issued her bonds to aid the railroads, securing herself by a first mortgage on the roads, and taking in exchange bonds of the companies. It was certified on the state bonds that they were protected by a first mortgage "as security for the holders thereof." The bonds, thus drawn, were indorsed by the railroad companies, and issued by them. The obliga-

Violation of
constitution
by state.

tion of the state was found unconstitutional, but it was held that, inasmuch as the railroad companies had indorsed the bonds thus drawn, they had guaranteed the existence of the mortgage, and the holders of the bonds were therefore entitled, as against them, to insist upon the validity of the mortgage, and to assert legal rights by virtue thereof. In the present case there is no mention of the existence of a mortgage on the face of the bonds declared on by the complainants; nor is there any statement of such mortgage in the act of 1870, under which they were issued. The claim here is merely that a mortgage resulted from the statute passed in 1866, which statute in express terms reserves a mortgage only for such bonds as are indorsed by the state. The case relied on involved no question of the existence of a mortgage, but the point at issue was whether an admittedly existing mortgage could be enforced against the corporation. Here, on the contrary, the question is whether the mortgage under the act of 1866 ever existed *quoad* the bonds issued under the act of 1870.

These conclusions are decisive of the cause, but other considerations, which affect the merits of the controversy, are equally fatal to the appellants. It cannot be doubted that, even if the bonds issued under the act of 1870 were secured by the statutory mortgage reserved by the act of 1866, they were second in rank, and therefore their holders were junior-mortgage creditors. Nor can it be gainsaid that the statutory mortgage conferred upon the state the power to sell the mortgaged property. This power was exercised in 1875. The grounds upon which it is asserted that the sale was void are: First, that before the sale it was announced that only bonds of the issue of 1866 would be received in payment, and that at the sale it was declared that such bonds would only be received at their market value. There is no averment in the bill that the first-mortgage creditors complained of these requirements, nor does it contain any allegation that the holders of the second-series of bonds, who are now championing the rights of the first-mortgage creditors, bid at the sale, or in any way manifested their willingness to free the property from the first-mortgage debt. The rights of the second-mortgage creditors were necessarily subordinate to the paramount rights of the creditors first in rank. The property of the company had been for nearly two years under seizure, the default having occurred in 1873. It was the plain duty of the second-mortgage creditors, if they were interested in preventing the sale, and wished to tender their bonds in payment, to bid a sufficient amount to lift the prior incumbrance. Not only is there no averment that they did this, but the bill contains an assertion that, in

Duty of holder
of bonds of
1870.

the event the mortgage indemnified only the state, then equality of rank existed between the holders of the second and the holders of the first series of bonds; and upon this alleged equality the complainants, as holders of the second series, base their claim to participate ratably in the distribution of the purchase-money, and thus infringe upon the unquestioned rights of the bondholders under the act of 1866.

The other ground of attack upon the sale was the incapacity of the state to purchase at her own sale, which, it is claimed, resulted from the fact that the statutory mortgage reserved by the act of 1866 made the state a trustee for the bondholders. Conceding this, the state was both a trustee and a mortgagee, and she had a direct individual interest in the property, by reason of her indorsement on the bonds. The general assembly of the state of Georgia had expressly authorized the governor to bid in the property, on behalf of the state, in case there was no bid sufficient to protect the outstanding obligation which bore the state's indorsement. Even if this provision be considered inapplicable upon the ground that the state could not lawfully bid at the sale under a power conferred upon herself by herself, the complainants' position would be untenable. It is conceded that the settled doctrine in Georgia is that the purchase by a trustee is not absolutely void, but merely voidable, at the option of the *cestui que* trust. *Worthy v. Johnson*, 8 Ga. 236. Let us suppose, for the sake of argument, that the *cestuis que trustent* in this case where the holders of the bonds which were issued under the act of 1866 and of those which were issued under the act of 1870. The bill contains an averment that the holders of the first class surrendered their bonds to the state after her purchase of the property, and that she had discharged her liability under her indorsement upon their bonds. In retiring these bonds the state paid off the first-mortgage debt, not only to the extent of her bid, but to nearly twice its amount. The action of the first-mortgage creditors in accepting the extinguishment by the state of their securities and the mortgage by which they were secured was, in effect, a ratification of the sale, and established its legal validity, so far as they were concerned.

Under these circumstances, conceding that the second series of bonds were secured by a second mortgage, their holders cannot equitably be allowed to avoid the sale without tendering reimbursement of the amount of the first mortgage. Their claims were subordinate to those of the holders of the first series, and they have no recourse until the latter are paid, and it would be grossly inequitable to allow them to avoid a sale which has been ratified by those who were primarily inter-

ested in the price resulting therefrom, without compelling them, as a prerequisite, to do equity by protecting the first incumbrancers. *Collins v. Riggs*, 14 Wall. 492; *Jones*, Mortg. § 1669; Pom. Eq. Jur. § 1220 *et seq.* Instead of doing this, although nearly two years had elapsed between the sale and the filing of the bill, the complainants assert that their bonds are, in the contingency last stated, equal in rank of mortgage lien with those of the holders of the first series, and hence that they are entitled to an equal participation in the proceeds of the mortgaged property. Indeed, in the discussion at bar, the contention was advanced that the retirement of the first-mortgage bonds by the state, after her purchase, extinguished the prior mortgage by which they were secured, and that, the sale being voidable at the instance of complainants,—an option which their bill asserts,—the second mortgage, which was held by them, has thus become first. No offer to pay the amount of the first mortgage was made prior to the purchase of the property by the defendants, and their title cannot now be divested, even if such an offer were made. We think the complainants are not entitled to the relief which they claim, and that the property passed to the defendants free from any lien under the statutory mortgage arising from the act of 1866 or 1870, even if from the latter any such mortgage ever resulted.

Affirmed.

Rights of Bondholders—Rights of Innocent Purchasers of Negotiable Bonds Fraudulently Pledged or Sold by President of Railroad Company.—In *Long Island Loan & T. Co. v. Columbus, C. & I. C. R. Co.* (U. S. Cir. Ct. D. Ind., Jan. 28, 1895), 65 Fed. Rep. 455, it was held that where a railroad company has made its negotiable bonds perfect in form, payable to bearer, and has caused them to be certified by a trustee to evidence that they have become obligatory, and has placed them in the possession of its president with authority to sell or exchange them for the benefit of the company alone, the title of an innocent purchaser for value, and before maturity, is not defeated by the fact that the president fraudulently pledged or sold such bonds for his own private use without the knowledge or consent of the company, and after it had become consolidated with other railroad companies, and although such bonds had when negotiated two unpaid interest coupons past due annexed to them. The court said: "A purchaser of negotiable railroad bonds in good faith and for their full market value may be a *bona-fide* holder, although some of the interest coupons attached thereto are past due and unpaid at the time of purchase. *Morgan v. U. S.*, 113 U. S. 476; *Thompson v. Perrine*, 106 U. S. 589; *Railroad Co. v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532; *Cromwell v. County of Sac*, 96 U. S. 51; *Bank v. Kirby*, 108 Mass. 497; *McLane v. Railroad Co.*, 66 Cal. 606; *State v. Cobb*, 64 Ala. 127; *Boss v. Hewitt*, 15 Wis. 260.

"In *Bank v. Kirby*, 108 Mass. 497, 501, the court say: 'We are referred to no case in which it has been held that failure to pay interest, standing alone, is to be regarded sufficient in law to throw such discredit upon the principal security upon which it is due as to subject the holder to the full extent of the security to antecedent equities.'

"To hold otherwise," the supreme court said in *Cromwell v. County of Sac*, 96 U. S. 51, 58, "would throw discredit upon a large class of securities issued by municipal and private corporations, having years to run, with interest payable annually or semi-annually."

"The doctrine was reaffirmed in *Railroad Co. v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532, and in *Morgan v. U. S.* 113 U. S. 476.

"But where it appears that the interest on the bond is overdue and unpaid, this is held in some cases, and I think erroneously, to be a circumstance of suspicion sufficient to put a purchaser on his guard, and to impair his title. *First Nat. Bank of St. Paul v. Commissioners of Scott Co.*, 14 Minn. 77 (Gil. 59); *Parsons v. Jackson*, 99 U. S. 434; *Morton v. Railroad Co.* 79 Ala. 590. The better doctrine, however, seems to be that suspicion of defect of title, or the knowledge of circumstances which would excite suspicion in the mind of a prudent man, or gross negligence on the part of the buyer, will not affect his title. Nothing short of bad faith on the part of the purchaser of negotiable bonds passing by delivery, and which are fair upon their face, will destroy their validity; and the burden of proof lies upon the person who assails the title of the party in possession. *Murray v. Lardner*, 2 Wall. 110; *Railroad Co. v. Lewis*, 33 Pa. St. 33; *Railroad Co. v. Cowdrey*, 11 Wall. 459; *Spence v. Railroad Co.*, 79 Ala. 576; *Goodman v. Simonds*, 20 How. 343.

"The fact that two interest coupons attached to each of the bonds were past due and unpaid at the time of his purchase, standing alone, does not impair the complainant's right to be deemed a *bona-fide* purchaser of the bonds, and entitled to protection as such. *Anon.*, 1 Salk, 126, was a cause where a bank-bill payable to A., or bearer, had been lost, and was found by a stranger, who paid it to C., for a valuable consideration. It was held by HOLT, C.J., that A. could not maintain trover against C., 'by reason of the course of trade, which creates a property in assignee or bearer.' Since the decision of LORD MANSFIELD in *Miller v. Race*, 1 Burrows, 452, there has been no serious dissent from the doctrine that the want of delivery of bank-notes and other paper intended to circulate as money is not available against a *bona-fide* holder for value, who has taken the same in due course of trade. *Worcester Co. Bank v. Dorchester & M. Bank*, 10 Cush. 488. If a perfected bank-note were stolen from the vaults of a bank before it was issued, and it should be passed by the thief in due course of trade, for value, to a *bona-fide* holder, the latter would acquire a good title as against its true owner. In respect of negotiable promissory notes, perfect in form, it has been held in some cases that the want of delivery by the maker will not be available to defeat the title of a *bona-fide* purchaser for value and before maturity. *Kinyon v. Wohlford*, 17 Minn. 239 (Gil. 215); *Shipley v. Carroll*, 45 Ill. 285; *Clarke v. Johnson*, 54 Ill. 296; *Gould v. Segee*, 5 Duer 260. In this country, however, the entire absence of delivery of negotiable notes and bills has been regarded, in a majority of the cases, as a sufficient defense even against a *bona-fide* holder, unless the maker has executed an instrument perfect in form, and has been guilty of negligence in letting it go out of his possession, and thereby given an opportunity to negotiate it to an innocent purchaser. *Burson v. Huntington*, 21 Mich. 415; *Hall v. Wilson*, 16 Barb. 548; *Chipman v. Tucker*, 38 Wis. 43; *Carter v. McClinck*, 29 Mo. 464. In England there are no decisions which have come under my notice necessarily determining the question. Some of the dicta affirm that delivery is indispensable (*Marston v. Allen*, 8 Mees. & W. 504; *Baxendale v. Bennett*, 3 Q. B. Div. 525); while others deny that the want of delivery by the maker will avail to defeat the title of a *bona-fide* purchaser for value before maturity (*Ingham v. Primrose*, 7 C. B. [N. S.] 82, 5 Jur. [N. S.] 710; *Young v. Grote*, 4 Bing. 253).

"It is generally agreed that the delivery of negotiable paper left in

escrow, contrary to the terms upon which it was to have been delivered, will pass a good title to the *bona-fide* transferee for value and before maturity. *Fearing v. Clark*, 16 Gray 74; *Graff v. Logue*, 61 Iowa, 704. In a note to *Willard v. Nelson*, 35 Neb. 651, the editor, after reviewing many authorities, says: 'We think the better rule is that he who signs a writing knowing that it is intended to be used, or may be used, for some business purpose, must at his peril ascertain that it is not a negotiable instrument, and, failing to do this, is liable absolutely, though he was procured to sign it by some fraudulent device or misrepresentation, or, having signed it advisedly, it was taken from his possession by fraud or theft, and without any intention on his part to deliver it to any one, or to let it be negotiated for his benefit or otherwise.'

"Negotiable railroad bonds, payable to bearer, are intended to pass from hand to hand in all the money markets of the world. It is the understanding of the commercial world that the purchaser of such bonds may safely rely on the title evidenced by possession as the true title, and that, in the absence of fraud or negligence so gross as to justify the inference of fraud, the title of a *bona-fide* purchaser for value before maturity is unsailable. Any other understanding would cast suspicion upon such bonds, and impair, if it did not defeat, the purpose of their issue. And so it has been said that a purchaser of negotiable bonds before maturity, in the usual course of business acquires a good title thereto, although they may have been stolen; in a suit by the purchaser of such the burden of proof that he did not acquire them in good faith is upon the defendant. *Evertson v. Bank*, 66 N. Y. 14; *Spooner v. Holmes*, 102 Mass. 503; *Seybel v. Bank*, 2 Daly 383, 54 N. Y. 288; *California v. Wells, Fargo & Co.*, 15 Cal. 336; *Association v. Avegno*, 28 La. Ann. 552; *Carpenter v. Rommel*, 5 Phila. 34; *Gilbough v. Railroad Co.*, 1 Hughes, 410 Fed. Cas. No. 5419; *Miller v. Race*, *supra*. Such negotiable bonds, in a certain sense, are the representatives of money, and freely pass by delivery in the money markets of all commercial countries. To accomplish this purpose, the holder of a perfected bond must be deemed to be the true owner, and be able to invest an innocent purchaser for value and before maturity with an unimpeachable title. The title of a *bona-fide* holder of such bond ought to stand on as secure a foundation as that of a person who receives a bank-note in the ordinary course of business. Any other doctrine would, in my judgment, undermine the very structure of commercial law, and shake the foundations of such paper credits."

Rights of Innocent Holder of Unmatured Negotiable Bonds as Collateral Security.—In *Hayden v. Lincoln City Elec. R. Co.* (Neb., Feb. 5, 1895), 62 N. W. Rep. 73, it was held that one who receives as collateral security to a loan contemporaneously made, negotiable bonds not yet matured, without knowledge of any defense to such bonds, is entitled to protection, as a purchaser to the extent of the amount of such loan.

Right of Bondholder Against Trustee Appointed to Protect Interest of Junior Bondholders—Laches.—In *Alsop v. Riker*, 155 U. S. 449, it appeared that trustees of third-mortgage bondholders procured a foreclosure of the second mortgage and with the proceeds of assessments purchased the property, and that to close the trust they conveyed the property so purchased to a new company subject to the first mortgage; that thereafter plaintiff, who held six of the bonds, and who was one of the *cestuis que trust* under the original agreement, was informed by the trustees, in answer to an inquiry by him, that his bonds had been barred by the foreclosure. Four years later he demanded payment from the trustees, but brought no action until August, 1876, six years after such notice, at which time six of the seven original trustees had died, and it was held that he was guilty of such laches as would preclude a recovery. The court said: "His laches cannot be ex-

cused upon the ground that the trust assumed by the trustees was express or direct, for it is clearly established that the trustees, as early as December, 1867, denied and repudiated, as the plaintiff knew, the existence of any trust in relation to such of the construction bonds as the plaintiff did not surrender to them. *Speidel v. Henrici*, 120 U. S. 377; *Riddle v. Whitehill*, 135 U. S. 621; *Philippi v. Philippe*, 115 U. S. 151. We therefore incline to think that this suit cannot be excluded from the operation of the statute of limitations of New York prescribing a limitation of six years for an action 'upon a contract, obligation, or liability, express or implied.' Civ. Code Proc. N. Y. in force prior to September 1, 1877; Voorhees' Code, § 91 (4th Ed.) 86; *Id.* (5th Ed.) 69, 70; *Miller v. Wood*, 116 N. Y. 351; *Carr v. Thompson*, 87 N. Y. 160; *Kirby v. Railroad Co.*, 120 U. S., 130, 139."

Laches of Bondholders in Enforcement of Claims—Rights of Innocent Third Parties.—In *Johnson v. Atlantic, G. & W. I. Transit Co.*, 156 U. S., 618, which was a suit to subject certain railroad property in the State of Florida to the effect of an alleged lien of second mortgage bonds, it appeared that the road was taken possession of about 1863, and was sold in 1866, and that the bill was filed in 1873; and it was held that the complainants were precluded by the long and unexplained lapse of time between the acts complained of and the institution of legal proceedings from maintaining such proceedings against innocent third parties whose interests became involved. *Citing Gallihier v. Caldwell*, 145 U. S. 368; *Harwood v. Railroad Co.*, 17 Wall. 78; *Oil Co. v. Marbury*, 91 U. S. 587; *Brown v. County of Buena Vista*, 95 U. S. 157; *Johnston v. Mining Co.*, 148 U. S. 360; *Foster v. Railroad Co.*, 146 U. S. 88.

Rights of Holders of Bonds Illegally Issued but Apparently Valid—Innocent Third Parties Taking Bonds as Security for Pre-existing Indebtedness—Officers and Other Persons with Knowledge of Illegal Issue—Persons who Parted with Nothing.—In *Baker v. Guarantee Trust & Safe Deposit Co.* (N. J., Feb. 11, 1895), 31 Atl. Rep. 174, it was held that where railroad bonds were issued in violation of a statute providing that bonds shall not be issued in a greater amount than at the time of such issue shall have been actually paid up as capital, or are issued to pay for the construction of a branch line which is authorized by the charter of the company, and such bonds are issued, secured by a mortgage which recites resolutions of both the stockholders and the directors, declaring the purposes and intention to be to issue the bonds for borrowed money only, and to an amount not to exceed the amount at the time actually paid in for capital stock, and to apply such moneys to the construction of the road, and contains nothing to show that it is in any respect illegal, or that an illegal issue of bonds under it was contemplated, such bonds are valid in the hands of innocent third parties who have parted with value or have taken them to secure a pre-existing indebtedness without a pre-ent parting with property or loss of rights, but are void in the hands of officers of the corporation, persons who had notice of the illegal issue, and of persons who gave no value therefor.

Creditor with Knowledge of Illegal Issue who was Entitled to Bonds.—Where a creditor of the corporation has received such bonds with knowledge of the circumstances of their issue, but who was entitled to bonds under an agreement with the corporation made prior to the knowledge by him of their invalidity, he will be regarded as an innocent holder.

Holder of Bonds as Collateral with Other Security—Subrogation of Corporation.—Where such bonds and other collateral are held as security for a debt, the corporation or its representatives will, when the debt is paid, become subrogated to the rights of the bondholder to the collateral security.

Extent of Liability of Corporation.—The corporation, in such a case, will be only liable to the holder of the bonds as security to the extent of the debt the bonds were given to secure.

Burden of Proof to Show Holding of Bonds for Value without Notice of their Invalidity.—A claimant who seeks to recover the amount of such bonds from a receiver of the corporation, has upon him the burden of showing that they came into his hands for value and without notice of their invalidity.

Corporation whose Officers are Likewise Officers of Company Issuing Bonds.—A building and loan association which has become possessed of such bonds in good faith is entitled to establish its claim against the assets of the corporation, notwithstanding that some of its officers and stockholders in such association were likewise officers of the corporation at the time of the issue of the bonds.

Director Connected with Illegal Issue.—A director holding bonds legally issued, as well as some which were illegally issued, as part of an illegal scheme with which he was connected, is not entitled to establish his claim to the amount represented by the valid bonds.

Validity of Acquisition of Pledged Bonds by President of Railroad Company—Who may Test Bona Fides of Transaction.—In *Hook v. Ayers* (U. S. Cir. Ct. App. 7th Cir., Oct. 1, 1894), 63 Fed. Rep. 347, it appeared that a railroad company which endorsed bonds of another road pledged about one-half of them to the cross-complainants, and the president of the company, with the knowledge of such pledges, pledged the remainder of the bonds to a syndicate composed of himself, two of the cross-complainants, and others. Thereafter the president, having purchased the rights of the syndicate to the bonds, sought to procure title to them by giving certain credits to the company, and it was held that the cross-complainants, suing neither as judgment creditors nor shareholders of the company, were in no position to test the *bona fides* of the transaction. *Following Hollins v. Iron Co.*, 150 U. S. 371; *Morrow Shoe Mfg. Co. v. New England Shoe Co.*, 57 Fed. Rep. 685, *on rehearing* 60 Fed. Rep. 341, 47 Am. & Eng. Corp. Cas. 383.

Application of Rule as to Payment of Bonds out of Particular Fund to Bonds Payable out of More than One Fund.—In *Seibert v. Minneapolis & St. L. R. Co.* (Minn., June 28, 1894), 59 N. W. Rep. 822, it was held that, while it is a rule that when a note or bond is, by its provisions, payable out of a particular fund, and no other provision is made for its payment, the liability to pay it exists only when the fund exists, and to the extent of that fund; yet this rule does not apply where the mortgage securing the bond provides also another fund out of which the bond is made payable; but in such case the bond is payable out of either or both funds.

Appealability of Decree Fixing Liability to Account for Bonds, and Allowing Credits to be thereafter Determined by State Court—Act Creating the United States Circuit Court of Appeals.—In *Merriman v. Chicago & E. I. R. Co.* (U. S. Cir. Ct. App. 7th Cir., Nov. 27, 1894), 64 Fed. Rep. 535, it was held that a decree fixing a liability to account for certain bonds, but expressly allowing the person so found liable to offset such sums as might thereafter be determined to be due him by a state tribunal, was not a final decree within section seven of the act creating the circuit court of appeals, which provides for appeals from interlocutory orders or decrees granting or denying an injunction in a cause in which an appeal from a final decree may be taken under the provisions of the act *Citing Bostwick v. Brinkerhoff*, 106 U. S. 3; *Grant v. Insurance Co.*, 106 U. S. 429, 431; *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 28, 16 Am. & Eng. R. Cas. 95; *Ex parte Norton*, 108 U. S. 237, 242; *Mower v. Fletcher*, 114 U. S. 127; *Dainese v. Kendall*, 119 U. S. 53, 54.

SCHMIDT, *et al.*

v.

LOUISVILLE, CINCINNATI & LEXINGTON R. CO.

(*Kentucky Court of Appeals, February 8, 1894.*)

Construction of Mortgage of Net Earnings of one Road on "Business Coming to it from or over" the Lines of Another Road.—A railroad company leased its unfinished line to a company operating a connecting line and mortgaged its road to the lessee to secure the payment of certain bonds which were to be disposed of by the lessee company. To secure the interest on such bonds, the lessee company mortgaged to the lessor the net earnings on its own lines which might accrue to it by reason of "business coming to it from or over" the lines of the lessor. *Held*, that the mortgage covered the net earnings of the lessee on business coming to it from, or business going from its own line to, the road of the lessor.

Method of Estimating net Earnings from Business Furnished by Connecting Line.—For the purpose of approximating such net earnings, the shipments over the lessee road should be subjected to the like cost of transportation as other business, and from the gross receipts the cost of producing them should be deducted.

Right to Interest on Net Earnings.—Such earnings should bear interest from the time when their payment was fixed by the contract between the companies, although their amount is disputed, and the contract is not altogether unambiguous.

APPEAL from Louisville law and equity court.

Simrall & Bodley, for appellants.

Helm & Bruce, for appellee.

HAZELRIGG, J.—In 1879, the Northern Division of the Cumberland & Ohio Railroad Company leased to the appellee, the Louisville, Cincinnati & Lexington Railway Company, for the term of 30 years, its unfinished road-bed, rights of way, with improvements and appurtenances, depots and depot grounds, machinery, tools, and implements, together with all its property rights and franchises, belonging to or in any way appertaining to its line of railway at the town of Eminence, Ky., thence running southwardly through the counties of Henry, Shelby, and Spencer, and terminating at Bloomfield, in the county of Nelson.

In this lease the first-named company agreed to mortgage to the appellee all its property, rights, and franchises belonging to, or in any wise appertaining to, its line of railway as described above, to secure the payment of 350 bonds of \$1000 each, with coupons attached, to run for a term of years. The

number of these bonds was subsequently reduced to 250. These bonds were to be put in the hands of the appellee, to be sold, and the proceeds applied to the construction of the Cumberland & Ohio Railroad, and, if there were any deficiency, to complete the road from Shelbyville to Bloomfield. The appellee was to supply it, and have a second lien therefor on the road. After such construction, the appellee was to operate the road under the lease for 30 years, and apply the net earnings derived therefrom to the payment of interest on the bonds indicated, and to the creation of a sinking-fund for their retirement. To this end, the lessee was to make to the lessor quarterly returns, giving full details of earnings and operating expenses, including the expense of keeping the road-bed in order. Out of the gross earnings was first to be deducted annually the sum of \$1000, to be paid the lessor, with which to keep up its organization; and, if the net earnings did not prove sufficient to pay the interest, and provide for the sinking-fund on the mortgage bonds, then the lessee (appellee),—if all other sources of raising money failed the lessor,—was to supply the deficiency, as far as might be done, by appropriating the net earnings, or so much as might be needed, on its own lines which might accrue by reason of business coming to it from or over lessor's lines.

The construction of the road from Shelbyville to Eminence was abandoned, because the appellee had obtained a long lease of the Shelbyville Branch road which connected with its own lines at Anchorage; thus connecting the contemplated road of the lessor with its own road, and making it a "feeder" therefor.

The sale of these bonds depended on the plan adopted for the prompt payment of the interest, and, in order that this might be met promptly, the appellee agreed to pay it during the construction of the road, and then, as we have seen, see to its payment out of the earnings indicated.

The appellee, at the start, contemplated giving an absolute guarantee of the payment of this interest; but, upon the advice of its attorney that it had no power to do so, it executed the following mortgage on the earnings pledged in the lease heretofore described: "That, whereas, by authority of an act of the general assembly of the commonwealth of Kentucky, approved the 18th day of March, 1878, the party of the first part has entered into a contract with the Northern Division of the Cumberland & Ohio Railroad Company for the lease, construction, and operation of the latter company's line of road from Eminence, in Henry county, Kentucky, through a part of said county, and the counties of Shelby and Spencer, and into Nelson county, so far as Bloomfield,—all in the state

of Kentucky,—said lease to continue for thirty years upon the terms therein set out, in which it is stipulated, by and on behalf of said first party herein, that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking-fund of three hundred and fifty bonds of one thousand dollars each, bearing interest at the rate of seven per cent per annum, payable half-yearly, on the first days of June and December, and having twenty years to run from the 2d day of July, 1879, to be issued by said Northern Division of the Cumberland & Ohio Railroad Company, and if all the sources of raising money of said Northern Division of the Cumberland and Ohio Railroad Company fail to provide for said interest and sinking-fund, then said first party herein should supply the deficiency, so far as the same may be done by appropriating the net earnings, or so much thereof as may be needed, on its own lines, which may accrue to it by reason of business coming to it from or over the said lines of the said Northern Division of the Cumberland & Ohio Railroad Company; and whereas, said contract of lease has been fully consummated by action of the stockholders of the first party herein, and it is now desired to carry into effect the said stipulation as to said net earnings: Now, in consideration of one dollar cash, in hand paid by said second party to said first party, and the premises, the said first party has this day and does hereby mortgage and put in lien all net earnings which may accrue to it, by reason of business coming to it from or over said lines of the Northern Division of the Cumberland and Ohio Railroad Company, to the said Joshua F. Speed, as trustee aforesaid (who is the trustee for the mortgage made by said Northern Division of the Cumberland & Ohio Railroad Company, to secure said three hundred and fifty bonds of one thousand dollars each), conditioned that if the net earnings of said leased premises do not prove sufficient to pay the interest and provide for the sinking-fund of said mortgage bonds, then said first party, if all other sources of raising money of said Northern Division of the Cumberland & Ohio Railroad Company prove insufficient, will supply the deficiency, so far as it may be done by appropriating and paying over promptly the net earnings, or so much thereof as may be needed, on its own lines which may accrue by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines, for the purpose of discharging said interest and sinking-fund as they severally fall due."

In pursuance of the contract of lease and mortgage, these bonds were placed on the market by the appellee, and sold at about their face value. No interest having been paid on

them since 1883, the appellant Schmidt, as successor to the trustee named in the mortgage, and the other appellants, who were the purchasers of the bonds, instituted this action to compel the appellee to account for the net earnings alleged to have accrued to it by reason of business coming to it from or over said Northern Division of the Cumberland & Ohio Railroad Company's lines, for the purpose of paying the defaulted interest and establishing the promised sinking-fund with which to retire the principal at maturity. The appellee denied that it had made any profit from the business coming to it from over the line of the leased road. The case was elaborately prepared, and, after a number of references to, and reports from, special commissioners—experts in the tabulation of figures—and the accumulation of several thousand pages of record, the chancellor finally dismissed the petition.

The appellants contend that the net earnings made on the lines of the appellee, and put in pledge under the lease and mortgage, were the net earnings on business coming to the appellee from both directions—that is to say, **Construction of mortgage.** earnings accruing by reason of business on its own line, brought to it on account of the building of the new road. The appellee says that it was the intention to put in pledge only the profits of business coming literally from off the new road onto the main line, and this is the first question to be decided.

In his first opinion, the learned chancellor held that the plaintiffs and other holders of the bonds were entitled to the net earnings of the appellee "on business coming to it from or over the lines of the Northern Division of the Cumberland & Ohio Railroad Company in both directions," and the commissioner was directed to ascertain and report the net earnings accordingly.

Again, considering the question carefully, the chancellor, more than a year after his first opinion, "reached the conclusion that the net earnings pledged embrace such as arise from business carried on over said road both ways—going and coming;" but, in the opinion and judgment appealed from, he comes to a different conclusion.

We are of opinion that his first impressions were correct. Business coming to it "from" the Northern Division of the Cumberland & Ohio means business coming to it by reason of, out of, or by aid of, the Northern Division of the Cumberland & Ohio. The new road is the source of the business, or the cause of the business. The fact that it has been built brings business from Louisville, Cincinnati, and Lexington to the lines of the appellee, and over its own line to Bloomfield and other points on the way. It also brings business on its

own line to the main line, and it is by reason of the new road, and, therefore, "from" the new road that the business originates. This construction is in accord with the spirit of the agreement and the purposes in view. The trunk line wanted a "feeder." It was willing to give up, temporarily, all it might earn by reason of the business—all the business—brought to it by the new road for the sake of having a permanent feeder in the future. It might not pledge its own resources, though willing to do so, to the payment of this interest; but it could give up all it made, for the time being, out of the business created by the new road.

The second question is, how are we to ascertain the net earnings in lien under the mortgage? The gross earnings are given, but, from them, what shall be deducted in order to show the net earnings? The appellants say that the appellee, being fully equipped with offices, rolling-stock, and other appliances for operating its roads, should account for the gross earnings received for doing the business brought to it from the Cumberland & Ohio, less the cost and expense of handling this particular business. That their contract is, not that they should have the net earnings of the Louisville, Cincinnati & Lexington Railway Company on business coming to it from or over the Cumberland & Ohio road after it has been thrown into hotch-potch with the other business of the appellee, and borne a proportion of the general expenses of the entire system, nor is it that they should have what is left of the net earnings after there has been deducted therefrom a certain proportion of all the expenses and all the losses which the appellee has incurred on all its business, but that their contract is for all the net earnings which the Louisville, Cincinnati & Lexington Railway Company may make out of this particular business, which, of necessity, is the difference between its gross earnings from that particular business and the additional cost or expense of handling that particular business.

Now, granting full effect to all counsel say as to limiting or restricting the deduction to be made from the gross earnings in the way of cost for handling this particular business, we fail to understand how we are to arrive at the cost of handling this business. It cannot be meant that each shipment of freight, to the profit of shipping which the appellants are entitled, is to be traced over the lines of the appellee to its destination, and the cost thereof sought to be ascertained by some special rule not applicable to shipments of other freight. Manifestly the particular shipments in which the appellants are interested enjoy no special place, or retain no privileged classification, when they come to be mixed with the other

shipments of the main line. Notwithstanding that the contract controls the final destination of the net earnings of this freight, and gives it to certain designated persons, nevertheless, in what respect, may we ask, does it cost less to ship a pound of this freight than to ship a pound of any other freight carried over the appellee's lines?

It is said that the appellee would have carried this general freight anyway, and been to the cost of doing so whether it carried this particular freight or not. But this can be said of every pound carried on the train, and, besides, it is not true that the appellee could have done the business thus coming to it from the Cumberland & Ohio without additional cost; and it is to find this additional cost that we are called on to adopt some just rule.

There is nothing in the mortgage which prescribes the method of ascertaining these net earnings. They are, therefore, to be arrived at in the usual way. The shipments in question must be subjected to a like cost of transportation as falls on other business. From the gross receipts must be deducted the cost of producing them. The traffic from the Cumberland & Ohio is solicited by the usual methods of advertising, received at the various depots of the main line, sorted, loaded, transported, unloaded, and delivered.

Counsel admit the existence of some proper charges against this business; otherwise, the appellee would be held for the gross earnings. But how shall we stop short of letting it bear the same proportion of cost as falls on other business? Why, for example, should a proportion of the cost of additional water-supply or fuel be charged against this business, and not a proportion of the amount paid for labor on the road? Certainly, the more business, the greater tonnage hauled, the more water, fuel, labor, etc., required, and the greater the wear and tear of the road and rolling-stock; and we know of no way to arrive at all this, save, approximately, by a proportion distributing the total operating expense over the whole business. This process has been approved in many cases. See *St. John v. Railway Co.*, 22 Wall. 136; *Pullan v. Railroad Co.*, 5 Biss. 237, Fed. Cas. No. 11,462; *U. S. v. Kanas Pac. Ry. Co.*, 99 U. S. 455.

In the first-named case it is said: "The business of the road is a unit. If it had been disintegrated, as proposed by the complainant, we apprehend it would have been found that the correlations of the main stem and the branches were such that the expenses and charges incident to the entire business, and those of its several parts, were so interwoven and blended that an accurate ascertainment of the net profit of the main

line and any of the auxiliaries, taken separately from the rest, would have been impracticable."

It appears from the record that some 8 or 10 commissioner's reports have been elaborately prepared and filed, seeking to ascertain the net earnings in dispute. The first one ignores the equitable method of distributing the cost of the business in question by proportion, as indicated above, and others reach results by using what is called "arbitraries." Of these, we may say they have no place in this case, by reason of the absence of any agreement to the effect that they may be used. Upon an examination of all the reports and the principles underlying them, we are of opinion that the report of Mr. Sewell is a nearer approximation to correct results than any of the others. It estimates the earnings on the appellee's lines in both directions, and finds the net earnings by deducting from the gross receipts the expenses of operating the road by which the receipts are earned. The cost of transportation is ascertained by proportion, and the proper percentage is charged to the business in dispute,—all, of course, aside from, and exclusive of, the expenditure of capital laid out in constructing and equipping the works themselves. This gives to the appellants the sum of \$60,192.27 of net earnings up to the date of the report named. Other reports reduce this sum, although purporting to be based on the same principles; and it may be admitted that by the exercise of sufficient ingenuity in multiplying the items of expense attending such a business as that of railroading, the actual earnings of a road may be made to vanish in a maze of mathematical calculation.

In addition to the fact that this report shows itself to be the nearest approach to absolutely correct results, its conclusions are approved by the judgments of Baird, Sewell, and others who have devoted years of study to the question at hand.

The chancellor finally reached the conclusion that, under the contracts in question, the net profits which the appellee made on its own lines from the business coming to it from the Cumberland & Ohio road should be applied, not in payment of the interest on the bonds, but in paying the losses incurred by the lessee and appellee in operating the leased road; holding, in other words, that there were no net earnings as long as there was a loss in running the leased road. We think this is manifest error. It was to meet this contemplated loss or deficiency that the contract was made, and in express terms directed the net earnings to be applied to the payment of this interest. The loss accruing to the appellee in this case, if any, arises, not out of the pledge of what it makes on its own lines from the business brought to it from the new road, but out of an unprofitable lease of the new road. The appellee

had the power to make this unlucky contract of lease, though it might not agree to pay this interest. The results arrived at by the commissioner, in the report, as the net earnings up to the date fixed in the report, are evidently fair and just to all the parties concerned, and this report is affirmed.

The judgment is reversed, with directions to take the report indicated herein as the basis for further proceedings consistent with this opinion.

ON REHEARING, MAY 17, 1894.

PER CURIAM.—In response to the inquiry as to whether or not the sums to which the bondholders are entitled under the opinion herein should bear interest, and, if so, from what time, we are of opinion that, although the amount of the earnings was in dispute, and the terms of the contract not altogether free from ambiguity, nevertheless the sums due were fixed by a written contract, and the time of payment also fixed, and we perceive no reason why the earnings as they are ascertained in the approved report of the commissioner should not bear interest from the time they should have been applied under the contract in payment of the interest on the bonds. If the commissioner has computed the earnings from too early a date, it is because the coupons on the bonds for such time had already been paid, and, if so, such coupons were taken in by the railway company, and will be admitted as credits on final hearing, which meets the suggestion of error in that particular made by counsel for the appellees.

The petition for rehearing is overruled.

Resolutions of Directors Contained in Mortgage as Prima Facie Proof of Their Authority to Make Same.—In *Hayden v. Lincoln City Elec. R. Co.* (Neb., Feb. 5, 1895), 62 N. W. Rep. 73, it was held that where there is contained in a mortgage a copy of resolutions described as having been adopted by the board of directors of the mortgagor, a corporation, from which resolutions it appears that said board had, as required, authorized the making of such mortgage, no further proof is necessary to a *prima facie* showing of authorization by the board of directors. *Citing Helmer v. Bank*, 28 Neb. 474.

Statutory Leave to Mortgage Locomotives, etc., as Affected by Requirements Concerning Chattel Mortgages—California Statute.—In *Southern California M. R. Co. v. Union Loan & T. Co.* (U. S. Cir. Ct. of App. 9th Cir., Oct. 24, 1894), 64 Fed. Rep. 450, it was held that section 2955 of the California Civil Code which provides that chattel mortgages may be made upon "locomotive engines and other stock of a railroad" is not controlled by section 2957, which provides that a mortgage of personal property shall be void as to creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith, and for value, unless it is accompanied by the affidavit of all the parties that it is made in good faith and without any design to hinder, delay, or defraud creditors. The court said: "There is a great diversity of opinion upon this question

in the different state courts where no express statute exists upon the subject. Jones, Ry. Sec. § 150. Several of the states, owing to the conflict in the decisions of the courts, have settled the matter by direct legislation. In all of the decisions which hold that the locomotive engines and other rolling-stock of a railroad are subject to the provisions of the act relating to chattel mortgages it is conceded, if the question is referred to, that, if there is an independent statute of the state authorizing railroad companies to mortgage their corporate property and franchises to secure the payment of their bonds, the chattel-mortgage act would not be applicable, because it must be and is universally acknowledged that it is within the power of the legislature of a state to regulate the mode and prescribe the manner in which the real and personal property within the state may be conveyed or mortgaged."

Validity of Mortgage on Rolling-stock Recorded as a Real Estate Mortgage.—In *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, it was held that a mortgage upon the real estate of a railroad company which purports to cover rolling-stock also, does not, under the laws of Washington, bind the rolling-stock, where the instrument is executed and recorded as a real estate mortgage, and the formalities required in the execution of chattel mortgages have not been complied with. *Citing* *Hoyle v. Railroad Co.*, 54 N. Y. 314; *Vilas v. Page*, 106 N. Y. 439.

Construction of New Jersey "General Railroad Law" Permitting Mortgages by Railroad Companies for Construction, Repairs, or Equipment—Limitation of Power to Amount of Paid-in Capital.—The general corporation act (Revision, p. 175, § 1, subsec. 4) authorizes every corporation within the state "to mortgage its real and personal estate and franchises." The act of April 2, 1873 (P. L. p. 88; Revision, p. 925), known as the "General Railroad Law," by its twentieth section (Revision, p. 931), provides "that any company incorporated under this act shall have power to borrow such sum or sums of money, from time to time, not to exceed in the whole its paid-up capital stock, as shall be necessary to build, construct, or repair their road, and furnish all necessary engines and other equipments for the uses and objects of said company, and to secure the repayment thereof by the execution, negotiation, and sale of any bond or bonds, and secured by mortgage on said land, privileges, franchises, and appurtenances of and belonging to the said company; provided, that said company shall not plead any statute or statutes against usury in any court of law or equity in any suit instituted to enforce the payment of any bond or mortgage executed under the provisions of this section; and provided further, that said bonds shall constitute a first lien on the railroad, its cars, real estate, and franchises, and the proceeds of said bonds shall be used for the purpose of aiding in the construction of said railroad." *Held*, that the intention of the statute is to regulate the general power of mortgaging by the corporation, and to limit it strictly to borrowing money upon its mortgage bonds, and to the amount of cash that had been paid in on account of subscriptions to its capital stock. *Baker v. Guarantee Trust & Safe Deposit Co.* (N. J., Feb. 11, 1895), 31 Atl. Rep. 174, *citing* *Water Co. v. De Kay*, 36 N. J. Eq. 548, 1 Am. & Eng. Corp. Cas. 670. The court said: "That such was the intention is set at rest by the proviso added to it by the legislature in 1878 (P. L. p. 20; Supp. Revision, p. 824), amending the section just above quoted by adding these words: 'And provided further, that if any person or persons shall issue such bonds to any greater amount than the amount that, at the time of such issue, shall have been actually paid up on the capital stock of such railroad, he, she, or they shall be guilty of a misdemeanor, and shall be punished by a fine of not more than five thousand dollars, or by imprisonment at hard labor not more than three years, or by both, at the discretion of the court.' That bonds secured by

a mortgage, and issued contrary to the provisions of the statute above cited, are void, as between the parties to the transaction, seems to be thoroughly settled in this state. *State v. Board of Chosen Freeholders*, 39 N. J. Law 632; *Crampton v. Zabriskie*, 101 U. S. 601; *Waterworks Co. v. Read*, 50 N. J. Law 665, 24 Am & Eng. Corp. Cas. 562. * * * The object of this enactment is manifest. It is to insure a certain measure of value to securities of this nature, issued by railroad companies organized under the general law of this state. The officials of a railway company incorporated under this act, if possessed of common honesty, will apply all moneys received by them on account of stock and bonds to the construction and equipment of the road. Such is clearly their duty; and if an equal sum is derived from each source, and devoted honestly to such use, the result will be that the holder of the mortgage bonds will have for his security property which has actually cost in cash double the amount of his debt. That he should have such security was the intention of the legislature, and any device which leads to a different result is an evasion of the law. Whether the railroad, when so finished and equipped, will be actually and intrinsically worth more or less than its cost, depends upon a variety of facts and circumstances, which each investor must take into account, and judge of for himself. The road, when built, may turn out to be a paying road, or it may not. The result, in that respect, depends on the amount of business it has to do, and the prices which it is able to charge, and the original cost of the road. It is proper, however, to remark that the mere fact that persons may be found who will take and pay for in cash half the cost of a proposed railroad, subject to a mortgage for the other one-half of such cost, is some guarantee to the persons who advance the money upon the mortgage that the enterprise will prove successful, and this guarantee the legislature intended to give by the statute just quoted. The legislature has not forbidden the giving of a mortgage upon a railroad not yet built—upon property not yet acquired. On the contrary, I think the language of the section in question plainly contemplates such action. Nor do I think there is anything in the policy of the law which forbids it. If the officers of the company are careful to issue the mortgage bonds no faster than actual payments are made on account of subscriptions to capital stock, and then apply the money so secured honestly to the construction of the road, there can be no serious objection to executing the mortgage in advance of the construction. The parties advancing their money on these securities have full opportunity to know by actual observation just what has been done and is being done from day to day. The line of the railroad, as filed in the office of the secretary of state, is open to their inspection, and they thus can protect themselves in that respect."

COLUMBIA FINANCE & TRUST CO.

v.

KENTUCKY UNION R. CO.

(*United States Circuit Court of Appeals, 6th Circuit, February 5, 1894, 60 Fed. Rep. 794.*)

Guarantor of Mortgage Debt Which Has Partially Paid the Debt as a Proper or Necessary Party to Foreclosure.—A corporation which has guaranteed the mortgage bonds of a railroad company, and which has made a partial payment on account of its liability as guarantor, is neither an indispensable nor a proper party to a suit to foreclose the mortgage, because *pro tanto* subrogated to the rights of the mortgagee, since payment of the whole debt for which the surety is liable is essential to subrogation, and the rights of the creditor in the mortgage must be entirely divested before the surety can be substituted by operation of law.

Sufficiency of Provision in Railroad Charter giving Guarantor of Bonds the Same Benefits of Mortgage as Bondholders, to Confer Statutory Right of Subrogation.—The guarantor did not acquire a statutory right to subrogation by a provision in the charter of the railroad company, that in order to enable it to guarantee the punctual payment of the interest and principal of the bonds authorized to be issued by it, "it is hereby expressly declared that the guarantors of such bonds shall be entitled to all the benefits of such mortgage or deed of trust made to secure such bonds to the same beneficial extent that the holders of such bonds may be entitled," since such a provision is a mere general declaration of the principles of subrogation.

Lease-contract Furnishing Terminal Facilities as "After-acquired Property."—A railroad mortgage of "all property, both real and personal, of every kind and description, which shall be hereafter acquired for use on said railroad," is sufficient to include a lease-contract furnishing terminal facilities to the mortgagor.

Reasonableness of Time Fixed for Redemption.—A provision in a decree for the sale of mortgaged property, fixing the time for redemption at four months, is not unreasonable.

Application to Railroad Property of Statute Allowing Redemption of "Real Estate" from Sale on Foreclosure.—The Kentucky statute of April 9, 1878, providing for the appraisal and redemption of real estate sold under a decree to enforce a mortgage, does not contemplate either the severance of railway property so sold into its constituent elements in order that that part which savors of realty may be redeemable, or that so peculiar and composite a property should be embraced within the term "real estate" as used in the statute.

APPEAL from United States circuit court for the district of Kentucky.

This is an appeal from a decree of foreclosure and sale of the Kentucky Union Railway. That railway has been con-

structed and is in operation between the city of Lexington, Ky., and the town of Jackson, Breathitt county, Ky., a distance of about 95 miles, a few miles of which were completed by the receiver in the case, under order of court, and with money raised by the issue of receiver's certificates. Case stated.

The complainants in the original bill were J. Kennedy Todd & Co. and the Central Trust Company. The former claimed to be general creditors of the Kentucky Union Railway Company to the amount of \$270,000, and the Central Trust Company is the trustee in the first mortgages executed by the railway company to secure the sum of \$2,500,000 of bonds.

The defendants were the railway company and the Columbia Finance and Trust Company, the trustee in the second mortgage.

The second mortgage was to secure the sum of \$1,300,000 of bonds, of which \$800,000 were outstanding.

Both the first and second mortgage bonds were absolutely guaranteed, both principal and interest, by the Kentucky Union Land Company, which company was not made a party to the suit.

Upon the allegations of insolvency the court appointed a receiver to take charge of the railway company.

During the progress of the cause many intervening petitions were filed, setting up claims for liens upon the property, but no question arises upon this appeal concerning them.

From the final decree of foreclosure and sale the Columbia Finance & Trust Company, trustee in the second mortgage, has prosecuted its appeal without *supersedeas*, and the Central Trust Company, trustee in the first mortgage, has prosecuted an appeal with *supersedeas*; the only error assigned in the latter case being also one of those assigned in the former.

The appeal of the Central Trust Company was disposed of at a former term by a stipulation entered into by all of the parties interested therein, by which the decree in the matter complained of was by agreement modified.

The errors now to be disposed of arise alone upon the appeal of the Columbia Finance & Trust Company.

St. John Boyle, for appellant.

Olin, Rives & Montgomery. Butler, Stillman & Hubbard, and Humphrey & Davie, for J. Kennedy Todd & Co. and Central Trust Company.

William Lindsay, for Passenger & Belt Railway Company.

LURTON, Circuit Judge (after the foregoing statement).—1. The first error assigned is in rejecting the amended answer tendered by the Columbia Finance & Trust Company on the

20th day of December, 1892, and in proceeding with the cause without requiring the Kentucky Union Land Company to be made a party thereto. It appears from this answer that the Kentucky Union Land Company guaranteed the payment of the principal and interest of the first-mortgage bonds, which guarantee was endorsed thereon; that this guarantee was made under authority of the charter of the Kentucky Union Railway Company. It further appears that when the coupons of this issue of bonds became due on January 1, 1891, the land company and the railway company jointly borrowed on their notes \$60,000 from J. Kennedy Todd & Co., and with the money paid that series of coupons. The insistence of the appellant is that the Kentucky Union Land Company became by said payments entitled to a lien upon the railroad to secure the payment of this sum of \$60,000, which was used for the payment of coupons, and that it was error to proceed without bringing that company before the court, that its lien might be established and enforced.

The unquestioned general rule as to parties in chancery is that all parties who are interested in the controversy should be made parties to the cause in order that there may be an end of litigation. If the Kentucky Union Land Company, by the payment alleged to have been made by it, as guarantor, became thereby entitled to a lien upon the property of the railway company, through subrogation, then it would have been a proper party, as it would have been interested in the property proceeded against. It would, however, in no sense be an indispensable party, because it would not have been directly affected by a decree enforcing the liens held by the holders of the first and second mortgage bonds. The distinction between a person directly interested in a controversy and directly affected by the decree, and one only indirectly affected by the decree, is well stated by Mr. Justice BRADLEY in the case of *Williams v. Bankhead*, 19 Wall. 571.

We do not think that the Kentucky Union Land Company was an indispensable, or even a proper party. It had made, at most, but a partial payment on account of its liability as guarantor. The rights of the creditor in the mortgaged property had not been extinguished by a payment of the whole debt. The payment of the whole debt for which the surety is liable is essential to subrogation. If the surety, upon making a partial payment, became entitled to subrogation *pro tanto*, and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the prop-

erty was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. Such a result would be grossly inequitable. Yet this is in effect the result of the contention urged. The equity of subrogation does not arise from the mere obligation to pay; it springs alone from payment. The liability of the surety for the remainder of the debt continued as well after as before such payment, and until the entire debt is paid the surety has no such equity as will entitle him to the active aid of a court of equity. *Sheld. Subr.* § 127; *Hollingsworth v. Floyd*, 2 Har. & G. 91; *Insurance Co. v. Dorsey*, 3 Md. Ch. 334. The creditors' right in the mortgage must be entirely divested before the surety can be substituted by operation of law, and allowed to stand in the shoes of a creditor. *Magee v. Leggett*, 48 Miss. 139; *Bank v. Benedict*, 15 Conn. 437; *Gannet v. Blodget*, 39 N. H. 152; *Harlan v. Sweeny*, 1 Lea, 682; *Gilliam v. Esselman*, 5 Sneed, 86; *Kyner v. Kyner*, 6 Watts, 221.

The provision in the charter of the Kentucky Railway Company upon which appellants insist that they have a statutory right of subrogation were in these words: "And in order to enable said company to guarantee the punctual payment of the interest and principal of such bonds, it is hereby expressly declared that the guarantors of such bonds shall be entitled to all the benefits of such mortgage or deed of trust made to secure such bonds to the same beneficial extent that the holders of said bonds may be entitled." Effect of charter provision.

This is no more than a general declaration of the principles of subrogation. There is nothing in this provision which can be reasonably construed as placing the guarantor upon an equal footing with a creditor secured by a mortgage as a result of every partial payment. The case of *Railroad Co. v. Schutte*, 103 U. S. 141, is not controlling. The charter provisions there considered are altogether unlike the provision contained in the charter of the Kentucky Union Railway Company.

2. The second error assigned is that "the court erred in adjudging that the right, title, and interest acquired by the Kentucky Union Railway Company, under the contract lease of the Passenger & Belt Railroad, was included or covered by the mortgage to the Central Trust Company.

The property embraced by the contract referred to consisted of about five miles of belt railroad around the city of Lexington, Ky., and certain interests in lands adjacent to the right of way and belonging to the Belt Railroad. It clearly appears that the Kentucky Union Railway Company

constructed its line to the boundary of the city of Lexington in such way as that it had no entrance into the city and no terminal facilities, and no connection with other railway lines entering that city.

After acquired property.

Its main line terminated at the boundary of the city in view of a purpose to obtain connection with other lines and terminal facilities by means of a contract with the Belt Railroad. This line gave to the Kentucky Union Railway Company connection with several other railway lines entering Lexington, and afforded it terminal facilities in the city. The contract of lease was made after the mortgage to the Central Trust Company, and was, indeed, completed under direction of the circuit court after appointment of receivers; that court being of opinion that it was necessary as a means of affording connection with other lines, and proper terminal facilities. That this leasehold passed as after-acquired property by the express terms of the mortgage to the Central Trust Company we have no doubt.

The provision in that mortgage describing the property covered by it is as follows: "All and singular its line of railroad, built and to be built, beginning at a point in Lexington, Fayette county, Kentucky; thence through Fayette and Clark counties to Kentucky Union Junction, on the line of the Elizabethtown, Lexington & Big Sandy Railroad; thence to Clay City; thence via Three Forks Jackson, in Breathitt county, being a distance of about one hundred miles. And also the lands, real estate, telegraph lines, railroad tracks, side-tracks, bridges, viaducts, buildings, depots, station-houses, car-houses, engine-houses, shops, warehouses, turntables, water stations, fences, structures, erections, fixtures, and appurtenances, and all other things of whatever kind belonging or in any wise appertaining, or which have been or may be acquired or provided for use upon or in connection with said railroad, and all the lands acquired, or that shall hereafter be acquired, destined for warehouses and other structures for railroad uses at either terminus, as well as along the line of said railroad; and also all locomotives, engines, cars, and other rolling-stock, equipment, machinery, instruments, tools, implements, furniture, and other chattels now or hereafter belonging to or appertaining to said railroad, and all property, both real and personal, of every kind and description, which shall hereafter be acquired for use on said railroad; and all the corporate rights, privileges, franchises, and immunities, and all things in action, contracts, claims, and demands of the said party of the first part, whether now owned or hereafter acquired in connection or relating to the said railroad; together with all and singular the tenements

and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues, and profits thereof; and also all estate, right, title, and interest whatsoever at law, as well as in equity, of said party of the first part, of, in, and to the same, saving and excepting subscriptions of cash or securities and lands not to be used in the operation of said railroad or in connection therewith."

The terms covering after-acquired property are abundantly sufficient to embrace this lease contract. *Trust Co. v. Kneeland*, 138 U. S. 416, 46 Am. & Eng. R. Cas. 268; *Railroad Co. v. Hamilton*, 134 U. S. 297, 43 Am. & Eng. R. Cas. 476; *Branch v. Jesup*, 106 U. S. 468, 9 Am. & Eng. R. Cas. 558.

3. The third error assigned is as to the decree ordering a sale of the interest of the Kentucky Union Railway Company acquired and held by it under the contract of lease of the property of the Passenger & Belt Railway. By the decree it was ordered that "all right, title, and interest shall pass to and be vested in the purchaser under this decree; subject, however, to all the terms, conditions, and limitations set forth in said contract of lease, as ratified by the circuit court in its decree of April, 1892." The part of the decree assigned as error follows, and is in these words: "And the purchaser shall assume and perform all the obligations imposed therein upon the Kentucky Union Railway Company; but this provision shall not be held to create any lien for the performance of such obligations upon any of the property herein ordered to be sold, other than the properties acquired under said lease."

From so much of the decree as is set out above the original complainants, J. Kennedy Todd & Co. and the Central Trust Company, prosecuted a writ of error with supersedeas. That writ of error has been disposed of at a former day of this term upon a stipulation, signed by all of the parties in interest, assenting to a modification of the decree by striking out the paragraph last set out, and the subject of the third assignment of error relied upon by the appellant, the Columbia Finance & Trust Company, is thereby disposed of.

4. The next assignment of error is as to so much of the decree *nisi* which ordered a sale of the road unless the decree should be satisfied by paying off the sums adjudged to be due within four months. The complaint is that the time for payment in order to save a sale was unreasonably short. The period allowed for payment before a decree of foreclosure becomes absolute is within the discretion of the court. *Howell v. Railroad Co.*, 94 U. S. 463. There was no such unreasonable

Reasonableness
of time for
redemption.

exercise of this discretion as to justify this court in maintaining this assignment.

5. The fifth assignment of error is that the circuit court ordered a sale without redemption and without appraisement. This road is wholly situated within the state of Kentucky. The insistence is that the railroad is real estate within the meaning of the statute of the state of Kentucky of April 9, 1878 (chapter 63, art. 8, of the General Statutes), which provides as follows: "(1) That before any real estate shall be hereafter sold, in pursuance of any order or judgment of a court, the commissioner or officer, whose duty it may be to sell the same, shall cause it to be valued, under oath, by two disinterested intelligent housekeepers of the county, not related to either party. If they disagree, the commissioner or officer shall act as umpire. If a part only of a tract of land is sold, the part sold shall, after the sale, be revalued in like manner. (2) The valuation so made shall be in writing, signed by the persons making it, and returned by such commissioner or officer to the court which made the order or rendered the judgment for the sale of the property, and the same shall be filed among the papers of the cause in which the judgment was rendered or the order made and also spread upon the records of the court. (3) If the real estate which may be sold in pursuance of such judgment or order does not bring two-thirds of such valuation, the defendant and his representatives shall have the right to redeem the same within a year from the day of sale by paying the purchaser or his representatives the original purchase-money and ten per centum per annum interest thereon. The defendant redeeming his land shall take receipt from the purchaser and lodge the same with the clerk of the court, and the same shall be entered upon the records of the court. The defendant may tender the redemption to the purchaser, his agent, or attorney, if in the county where the land lies, or in the county in which the judgment is obtained or order of sale made; and if the same is refused, or if the purchaser does not reside in either of said counties, the defendant may, before the expiration of the year, go to the clerk of the court in which the judgment is rendered or the order made and make affidavit of such tender and refusal, or that the purchaser, his agent, or attorney, does not reside in either of said counties. Thereupon he may pay to such clerk the redemption-money for the purchaser, and the clerk shall give a receipt therefor and file said affidavit among the papers of the cause. When the right of redemption exists the defendant may remain in possession of the property until it expires. Real estate so sold shall not be conveyed to the purchaser until the right to redeem

Statutory
right of re-
demption.

the same has expired, and if the same be redeemed in accordance with the provisions of this act, such sale thereof, from and after such redemption, or from and after such deposit of the redemption-money with the clerk, be null and void."

A state law conferring a right of redemption after a sale by execution, or under a decree to enforce a lien or mortgage, is obligatory upon federal courts sitting in equity as to lands within said state, and decrees of sale should be made so as to conform to the laws of the state so far as may be necessary to give full effect to the right. *Brine v. Insurance Co.*, 96 U. S. 627; *Orvis v. Powell*, 98 U. S. 176; *Parker v. Dacres*, 130 U. S. 43. If the statute of Kentucky, above cited, applies to a railroad situated within the state, then the decree does not conform to the law of the state.

A like question was decided by the supreme court of the United States in *Hammock v. Trust Co.*, 105 U. S. 77, 7 Am. & Eng. R. Cas. 465. The question in that case arose under the redemption statutes of the state of Illinois. The statute of that state provided for the redemption of lands "sold under and by virtue of any decree of a court of equity for a sale of mortgaged lands." It was provided with reference to the latter case "that it should be lawful for the mortgagor of such lands, his executors, administrators, or grantees, to redeem the same in the manner prescribed for the redemption of lands sold by virtue of executions issued upon judgments at common law; and judgment creditors may redeem lands sold under any such decree, in the same manner as is prescribed for the redemption of lands sold upon execution upon judgments issued at common law." Upon elaborate consideration it was unanimously decided by that court that a railroad was not within the provision of that statute.

The learned counsel for the appellant have undertaken to draw a distinction between the state law of Kentucky and that of Illinois, which they have argued is sufficient to distinguish this case from that of *Hammock v. Trust Co.*, *supra*. These distinctions are predicated upon the propositions: (1) That under the law of Illinois a railroad property consisted in; (a) its franchises; (b) its movable property, such as rolling-stock, supplies, etc., which were under the common law personalty; (c) its right of way, to which was affixed its rails, bridges, culverts, depots, etc., and which was clearly real estate. The conclusion drawn from this common-law division of its property was commented on by the Supreme Court of the United States as fatal to the insistence that, when a railroad was mortgaged as an entirety, it was redeemable as "real estate," within the meaning of the Illinois statute conferring the right of redemption when real estate was sold to enforce

the lien of a mortgage, which, under the law, covered the franchises, personalty, and realty as unitedly constituting a railroad. In contrast it has been insisted that, under the decisions of the highest court of Kentucky, at the time the mortgage to the Central Trust Company was executed in 1888: (a) A railroad was a unit, and that its movable property was so affixed to its real estate as to be held fixtures, and therefore inseparable. To support this proposition the cases of *Phillips v. Winslow*, 18 B. Mon. 448, and *Railroad Co. v. Elizabethtown*, 12 Bush, 233, have been cited. (b) That, in harmony with this, the same court has held that railroad shares descend as realty to the heirs, and are subject to dower. *Price v. Price's Heirs*, 6 Dana, 107, and *Copeland v. Copeland* 7 Bush, 349. (c) That the franchises of a railway company are not prerogative franchises, and that a railway could be operated without a franchise. *Railroad Co. v. Metcalfe*, 4 Metc. (Ky.) 199. The cases cited do not, in our judgment, support the conclusion sought to be drawn.

Phillips v. Winslow, *supra*, was a case where a trustee under second mortgage made to secure an issue of bonds, and covering all the property of the company then in existence, as well as all after-acquired property, filed a bill to enjoin certain proceedings at law by judgment creditors, one of whom had levied on certain movable property and was about to sell, while the other had seized and sold, and bought at his own sale under execution, certain cars, car-wheels, firewood, and stone-coal, being supplies for the operation of the road. The levy was exclusively upon property acquired after the mortgage under which the plaintiff claimed, but was embraced by the clause covering after-acquired property. After deciding that the property was not subject to seizure by execution, because it was embraced in the mortgage, the court was confronted with the proposition that the plaintiff had an ample remedy at law by replevin or an action for damages. This the court decided upon a consideration of the irreparable character of the damage to creditors having a mortgage upon a railway as a unit which would result to them from such a seizure in view of the unity of railroad property, and the great inconveniences resulting to the public from the interference with the equipment and necessary supplies of a common carrier. The court did not decide that the rolling-stock of a railroad passed with the realty as a fixture. It certainly did not decide that cordwood and stone-coal were fixtures, and yet the reasoning of the court was applied as much to such supplies as it was to the freight-cars and detached car-wheels, which were also in the levy.

In the subsequent case of *Railroad Co. v. Elizabethtown*,

supra, it was expressly ruled that a municipality could not dismember a railroad by a seizure for taxes of the engines and cars of a railway company. It is true that LINDSAY, C.J., did, in passing upon this question, observe that in *Phillips v. Winslow* the engines and cars of a railroad "were treated as fixtures." But that case was not, as we have seen, put on any such ground, and indeed no such question arose for decision. Neither that case nor the decision in *Railroad Co. v. Elizabethtown* rested upon any technical consideration of the law of fixtures. The first went off, so far as the point now in question is concerned, upon the question of equitable remedy. The latter was vested upon the high and rational ground that a railroad was an entirety, and, being charged with quasi public duties as a common carrier, could not, from considerations of public policy, be disabled or dismembered by seizure under execution of its necessary equipments or supplies. It is true both cases recognized the unity of a railroad property resulting from its structure and utility. Severance of such a property is destructive of the interests of all concerned, and disables the road in the discharge of its public functions. Neither case held that a railroad property considered as an entirety was technically realty. Neither do the cases which decide that stocks in railway companies descend as realty bear upon the question. In both cases the court recognized that such shares represented both real and personal property, and ruled that this fact did not conflict with their classification as incorporeal hereditaments. On this subject that court, in *Price v. Price's Heirs*, 6 Dana, 107, said: "The right conferred on each shareholder is unquestionably an incorporeal hereditament. It is a right of perpetual duration; and, though it springs out of the use of personalty, as well as lands and houses, this matters not. It is a franchise which has ever been classed in that class of real estate denominated an incorporeal hereditament. An annuity, though only chargeable upon the person of the grantor, is an incorporeal hereditament; and, though the owner's security is merely personal, yet he may have a real estate in it. 2 Bl. Comm. 40. Much less can it be doubted that a franchise created by act of incorporation, unlimited in duration, and springing out of the combined use of lands and personalty, should be denominated and classed as real estate."

These cases do not preclude us from considering the inherent nature of the several kinds of property which constitute that great public work called a railroad. Neither do they serve to throw any valuable light in determining whether such a property, when lawfully mortgaged as an entirety, is "real estate" within the intent of the Kentucky statute con-

ferring the right to redeem real estate when sold to fore-
 close a mortgage. That statute, in our judgment,
 Nature of rail- did not contemplate either the severance of a rail-
 road property. road, when sold, into its constituent elements, in
 order that that part which savored of realty might
 be redeemable; nor did it contemplate that so peculiar and
 composite a property should be embraced within the term
 "real estate" as used in that statute. The value of such a
 property consists in its maintenance as a unit. This unit the
 state provided might be mortgaged. It would be unprofitable
 to consider whether an individual, or a group of individuals,
 could own and operate a railroad without express authority.
 The franchise to be a railway, to exercise the great power of
 eminent domain, and to exact tolls for freight and passengers,
 was a franchise of value, and this, too, the legislature has
 permitted this company to embrace within its mortgage.
 Upon it credit has been extended. This is a part of the
 entirety which the creditors secured by this mortgage, and
 have a right to bring it to sale, along with the tangible prop-
 erty which it secures and renders valuable. That franchise
 is not real estate, and is not leviable at law. The controlling
 reasons which induced the decision in *Hammock v. Trust Co.*
 sprang from a consideration of the unity of a railroad prop-
 erty. These reasons are as masterful, when we come to con-
 strue this Kentucky statute, as they were in the case from
 Illinois. The distinction between the two statutes, and differ-
 ences in the general law of Illinois and Kentucky, are not
 sufficiently marked to justify, certainly not to demand, that
 this case shall be distinguished from *Hammock v. Trust Co.*

We are the better satisfied with our conclusion when we
 look at the state of the law of Kentucky at the time the circuit
 court was called upon to construe this redemption statute:
 (1) In 1871, long antecedent to this mortgage, the legislature
 of Kentucky, manifestly induced thereto by the
 Statutory and constitutional provisions. case of *Price v. Price's Heirs*, and the case of *Copeland v. Copeland*, cited above, passed an act de-
 claring railway shares personal property. (2) By
 section 212 of the new constitution of Kentucky, adopted in
 1891, and in force when this decree was entered, it was enacted
 that the rolling-stock of a railroad should "be considered
 personal property, and liable to execution and sale in the
 same manner as the personal property of individuals."
 Clearly this constitutional recognition of the movable prop-
 erty of a railroad as personal property disabled the court
 from holding that the personal property of this road should
 be redeemable as "real estate." It would therefore follow
 that, if any right of redemption exists in the case of the sale

of a railroad, it must be limited to so much of the railroad property as was real property under the law of Kentucky at the time of the sale. The reasons of public inconvenience, and the absolute injury which would result to lien creditors whose liens embraced the whole property arising from such dismemberment and partial right of redemption, would demand another construction of the redemption statute if one was admissible under well-settled rules of law.

The decree, as modified by the stipulation before mentioned, must be affirmed. The costs will be equally divided between the appellant and the Passenger & Belt Railroad. This division is made in consequence of the stipulation made upon the appeal of the Central Trust Company, by which the present appellant's third assignment of error was in effect conceded to have been well taken.

Railroad Aid Bonds.—See note to *State v. Chester & L. R. Co.*, 5 Am. & Eng. R. Cas. 241. Also notes, 47 Am. & Eng. Corp Cas. pp. 302, 323, 367, 377, 419.

Necessary Parties to Railway Foreclosure.—See appeal of *Harrisburg & Eastern R. Co. (Pa.)*, 36 Am. & Eng. R. Cas. 249, and note, 250.

Guarantee of Bonds of Another Company.—See *Camden & Atlantic R. Co. v. Coxe (Pa.)*, 26 Am. & Eng. R. Cas. 103, and note, 105.

Mortgages on "After-acquired Property."—See *Hamlin v. European & North American R. Co. (Me.)*, 4 Am. & Eng. R. Cas. 503, and note, 511. *Central Trust Co. v. Kneeland (U. S.)*, 46 Am. & Eng. R. Cas. 268, and note, 275.

What Constitutes Realty of Railroad Company.—See *First National Bank of Salem v. Anderson (Va.)*, 12 Am. & Eng. R. Cas. 411, and note, 416.

Foreclosure.—Right of Junior Mortgages to Foreclose—Former Decision Explained.—In *Seibert v. Minneapolis & St. L. R. Co. (Minn., June 28, 1894)*, 59 N. W. Rep. 822, it was held that the former decision of the court (reported in 52 Minn. 246, 57 Am. & Eng. R. Cas. 208), did not amount to a holding that the junior mortgagee could not foreclose its own mortgage. The court said: "Appellant contends that such decision of this court in this case in 52 Minn. 246, 57 Am. & Eng. R. Cas. 208, disposed of this case, and that the district court had no authority afterwards to enter the judgment herein entered. We do not agree with appellant. On that appeal this court did not so hold. It merely held that prior mortgages were entitled, out of the income in the hands of the receiver, to have their interest paid, without being compelled to elect to declare their principal due, and join with plaintiff in foreclosure of their mortgages in this action, and "that there is no rule or principle, either in law or equity, upon which a court may require a senior mortgagee, against his will, at the instance of a junior mortgagee, to foreclose his mortgage before it is due." This was not holding that the plaintiff could not for this reason proceed to foreclose his own mortgage. In fact that appeal was taken from a provisional order, and did not involve the whole case; so that the most that could be claimed for it is that it established the law of the case as to further proceedings. But it laid down no such law as claimed by appellant."

Equity Powers and Jurisdiction in Foreclosure of Railroad Mortgages.—In *Farmer's Loan & T. Co. v. Winona & S. W. R. Co. (U. S. Cir. Ct. D.*

Minn., Nov. 20, 1893), 59 Fed. Rep. 957, it was held that where a bill is filed by bondholders for the purpose of foreclosing a railroad mortgage, the equity powers and jurisdiction of the court are precisely what they are in any other suit for foreclosure of a mortgage after maturity of the mortgage debt or some part thereof. The court said: "In such a suit the court may appoint a receiver for the same reasons that would influence it to make such an appointment in any other case of foreclosure. Such a foreclosure may be defeated by the mortgagor paying the overdue interest at any time before other defaults occur, and are set up in the bill, as they may be, for the decree may require the payment of all interest coupons then due, though some of them matured since the institution of the suit, and of the principal sum also, if, by the terms of the mortgage, it has become due."

Ordering Payment of Interest on Prior Mortgage.—In *Cleveland, C. & S. R. Co. v. Knickerbocker Trust Co.* (U. S. Cir. Ct. N. D. Ohio, E. D., Dec. 11, 1894), 64 Fed. Rep. 623, which was a suit by a railroad company against a trust company and others to obtain the appointment of a receiver of the complainant, and to marshal its assets and ascertain the several liens thereon, and to obtain a decree enforcing the equities of all parties with reference to the complainant's assets and liabilities, a trust company which was trustee under the mortgage presented a petition asking that the receivers be directed to pay certain interest on its first mortgage which covered a part of the line of the complainant company, but there was no allegation or proof that the foreclosure of the first mortgage would dismember the railroad system and destroy its earning power, and the court held that as it had incurred, since taking possession of the property, a large indebtedness, and as it was its duty to look after the security of the indebtedness, and pay it as soon as reasonable, it consequently would not order the payment of the interest on the first-mortgage bond, out of moneys in the receiver's hands.

Construction of Provisions of Mortgage Relative to Right to Foreclose on Default.—In *Farmer's Loan & T. Co. v. Chicago & N. P. R. Co.* (U. S. Cir. Ct. N. D. Ill., May 16, 1894), 61 Fed. Rep. 543, a mortgage contained the following provisions: "In case default shall be made in the payment of any semi-annual instalment of interest of any of the said bonds, and if such interest shall remain unpaid and in arrears for the period of six months, * * * it shall be the duty of the trustee, upon a requisition in writing, signed by the holders of not less than one-quarter in amount of said bonds then outstanding, and upon adequate security and indemnity against all costs, expenses, and liabilities to be by the trustee incurred, to proceed to enforce the rights of the bondholders under this indenture, either by the exercise of the powers granted by articles 9 and 10 of this indenture, or of any of said powers, or by a suit or suits in equity or at law in aid of the execution of such powers, or otherwise, as the trustee, being advised by counsel, shall deem most effectual to enforce such rights, subject to the power hereby declared of a majority in interest of the holders of said bonds that shall be then outstanding, in writing, or by vote, at a meeting duly held, to instruct the trustee to waive any such default, or upon adequate security and indemnity as aforesaid, to enforce the rights of the bondholders by reason thereof: provided, that no action of the trustee or of the bondholders in waiving a default shall extend to or be taken to apply to or affect any subsequent default, or impair the rights of the trustee or of the bondholders resulting from such subsequent default; it being understood, and it is hereby expressly declared, that the rights of entry and sale hereinbefore granted are intended as cumulative remedies, additional to all other remedies allowed by law, and that the same shall not be deemed, in any manner whatsoever, to deprive the trustee or the beneficiaries under this trust of any legal or equitable remedy by judicial proceedings, consistent with the provisions of this indenture, according to the true intent and

meaning thereof: provided always, and it is hereby expressly declared and agreed, that no holder or holders of a bond or of any bonds secured hereby shall have the right to institute any suit, action, or proceeding, in equity or at law, for the foreclosure of this indenture, or for the execution of the trusts thereof, or for the appointment of a receiver, or any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured, without first giving notice in writing to the trustee of default having occurred and continued, as in this article aforesaid, and requesting the trustee, and affording it a reasonable opportunity to institute such action, suit, or proceeding in its own name, or to proceed to exercise the powers hereinbefore granted, and also offering to it adequate security and indemnity against the costs, expenses, and liabilities to be incurred therein or thereby; and such notification, request, and offer of indemnity are hereby declared to be conditions precedent to any suit or action for the foreclosure or for the execution of the trusts of this indenture, or for the appointment of a receiver, and to any other action, suit, or remedy hereunder, or under or upon any bond or coupon for interest hereby secured. Article 9, referred to, related to the right of the trustee to enter and operate the road in case of default in payment of interest continuing for six months. Article 10 treated of the right of the trustee to enter and sell in case of default of the principal of the bond, both powers to be exercised upon requisition and indemnity, and it was held that the trustee might foreclose immediately upon default in payment of interest. The court said: "I think this case falls within the principle of *Railroad Co. v. Fosdick*, 106 U. S. 47, 7 Am. & Eng. R. Cas. 427; *Morgan's L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 45 Am. & Eng. R. Cas. 631; *Farmers' Loan & Trust Co. v. Winona & S. W. Ry. Co.*, 59 Fed. Rep. 957. While it is true that a mortgagor has the right to stipulate for a breathing spell for the payment of his matured debt, it is still true that the limitations upon the powers of the trustee to take the legal proceedings to enforce payment upon default should be strictly construed. *Guaranty Trust & Safe Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 45 Am. & Eng. R. Cas. 689.

In *Farmers' Loan & T. Co. v. Winona & S. W. R. Co.* (U. S. Cir. Ct., D. Minn., Nov. 20, 1893), 59 Fed. Rep. 957, a mortgage provided that until default in the payment of principal or interest, or some part thereof, the company should use and enjoy the mortgaged property and franchises, but that if such default should continue for a period of six months after demand for payment of the interest in writing, it should be lawful for the trustee to take possession of the mortgaged property. It further provided that this provision should be "cumulative to the ordinary remedy by foreclosure in the courts; and the trustee herein may at its discretion, and upon the written request of the majority in value of the bonds then unpaid shall (upon being properly indemnified), institute proceedings to foreclose in such manner (by sale under the said power or by suit) as the said majority of bondholders may direct. * * *" And it was held that the first provision was a limitation of the power of the trustee to oust the railway company from possession of the mortgaged property under the powers conferred by the mortgage, and did not operate as a limitation of the right of the holders of overdue coupons, or the trustee acting for them, to enforce payment of such coupon by a bill in equity to foreclose the mortgage. Citing *Guaranty Trust & Safe-Deposit Co. v. Green Cove Springs & M. R. Co.*, 139 U. S. 137, 45 Am. & Eng. R. Cas. 689; *Alexander v. Railway Co.*, 3 Dill. 487, Fed. Cas. No. 166; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46; *Dow v. Railway Co.*, 20 Fed. Rep. 260, 17 Am. & Eng. R. Cas. 324.

Sufficiency of Complaint Asking Excessive Relief to Authorize Decree of

Foreclosure and Sale.—In *Seibert v. Minneapolis & St. L. R. Co.* (Minn., June 28, 1894), 59 N. W. Rep. 822, it was held that although a part of the relief asked in foreclosure by the trustee named in the mortgage may be foreign to the trust, yet if the complaint show sufficient to entitle him to a decree of foreclosure and sale, the granting of that relief will not be a departure or a material variance from the cause of action alleged. The court said: "It is claimed by appellant that the object of this suit was foreign to the plaintiff's trust; that it was an action to wind up the affairs of the corporation, and not to foreclose plaintiff's mortgage; that to decree the foreclosure of this mortgage alone under that complaint is a departure, or a material variance, from the complaint. We are not of that opinion. If a part of the relief asked was foreign to plaintiff's trust, none of the relief granted was. Plaintiff asked more relief than the foreclosure of his mortgage, but the facts alleged by him in his complaint showed that he was not entitled to any more. See former appeal, 52 Minn. 246, 57 Am. & Eng. R. Cas. 208. If the complaint demanded more relief than plaintiff was entitled to on the facts pleaded, this is no reason why he should not have the part of that relief to which he was entitled. But the statute goes further than that. Section 267, c. 66, Gen. St. 1878, provides that if there is no answer the relief cannot exceed that demanded in the complaint, but in any other case the court may grant any relief consistent with the case made by the complaint, and embraced within the issue. See also *Counor v. Board of Ed.*, 10 Minn. 439 (Gil. 356); *Metzner v. Baldwin*, 11 Minn. 150 (Gil. 95); *Railroad Co. v. Rice*, 25 Minn. 278; *Canty v. Latterner*, 31 Minn. 239."

Right of Party Consenting to Decree of Foreclosure and Sale Thereunder to Question Correctness of Decree.—In *Hayden v. Lincoln City Elec. R. Co.* (Neb., Feb. 5, 1895), 62 N. W. Rep. 73, it was held that a party who has consented to a decree of foreclosure and a sale thereunder cannot be heard on appeal to question the correctness of the decree in so far as it was authorized by his own stipulation.

Sale—Validity of Sale of Railroad under Florida Improvement Act—Acts of Trustees of Internal-Improvement Fund as Recognition of Road as Actually Constructed.—In *Johnson v. Atlantic, G. & W. I. Transit Co.*, 156 U. S. 618, it appeared that the Florida Railroad Company, incorporated by the state of Florida by an act approved Jan. 8, 1853, authorized the construction of a road from a point near the Atlantic Ocean to another point near the Gulf of Mexico; that in 1855 (Jan. 6) the state passed an act known as the General Improvement Act which designated among other lines to be aided a line running from Amelia Island to Tampa Bay "with an extension to Cedar Keys." Subsequently, in the same year, the legislature empowered the Florida Railroad Company to construct a line under the improvement act, having the same terminal points. After the passage of the act of Jan. 6, 1855, the company gave notice to the trustees designated by the improvement act of its acceptance of the provisions of the act and described their route as from Amelia Island to Cedar Keys. Thereafter they constructed the line between those points, issued first-mortgage bonds in accordance with the improvement act, which were used to pay for the construction, for some time thereafter made payment to the trustees as required by the act, and the latter applied the same to the interest of the mortgage bonds. The road was completed in 1861, but the company having failed to pay the interest on such bonds possession was taken by the trustees, who sold the road to the highest bidder. *Held*, that the acts of the trustees were a recognition of the road as it was actually constructed, and that it could not be contended that they had no authority to sell under the provisions of the act of Jan. 6, 1855.

Status of State Officers During War of Rebellion.—In *Johnson v. Atlantic*,

G. & W. I. Transit Co., 156 U. S. 618, which was a suit to subject railroad property to the effect of an alleged lien of second-mortgage bonds, it appeared that a sale of the road had been made by the state of Florida under the general improvement act of 1855, and it was contended that the persons who acted as trustees of the internal improvement fund provided for by the act in taking possession of the railroad, and in selling it, were not legally entitled to act as such, since they were not officers of the state, for the reason that at the time of the sale the state was in rebellion against the government, and it was held that the contention was untenable. The court said: "This contention is disposed of by referring to the well-settled doctrine, affirmed in repeated decisions of this court, 'that the acts of the several states, in their individual capacities and of their different departments of government,—executive, judicial, and legislative,—during the war, so far as they did not impair, or tend to impair, the supremacy of the national authority or the just rights of citizens under the constitution, are, in general, to be treated as valid and binding. The existence of a state of insurrection and war did not loosen the bonds of society or do away with civil government or the regular administration of the laws. Order was to be preserved, police regulations maintained, crime prosecuted, property protected, contracts enforced, marriages celebrated, estates settled, and the transfer and descent of property regulated, precisely as in time of peace. No one that we are aware of seriously questions the validity of judicial or legislative acts in the insurrectionary states touching these and kindred subjects when they were not hostile in the purpose or mode of enforcement to the authority of the national government, and did not impair the rights of citizens under the constitution.' *Horn v. Lockhart*, 17 Wall. 570.

"In *Sprott v. U. S.*, 20 Wall. 459, the same views were expressed: 'The insurgent states merely transferred the existing state organizations to the support of a new and different national head. The same constitutions, the same laws for the protection of property and personal rights, remained, and were administered by the same officers. These laws, necessary in their recognition and administration to the existence of organized society, were the same, with slight exceptions, whether the authorities of the state acknowledged allegiance to the true or false federal power. They were the fundamental principles for which civil society is organized into government in all countries, and must be respected in their administration under whatever temporary dominant authority they may be exercised. It is only when, in the use of these powers, substantial aid and comfort were given, or intended to be given, to the Rebellion, when the functions necessarily reposed on the state for the maintenance of civil society were perverted to the manifest and intentional aid of treason against the government of the Union, that their acts are void.'"

Liability of Purchaser at Foreclosure Sale for Claims Allowed on Intervention after Payment of Sum Bid and Assignment of Rights.—In *Chicago & O. R. Co. v. McCammon* (U. S. Cir. Ct. App. 7th cir., May 1, 1894), 61 Fed. Rep. 772, a decree in an action to foreclose a railroad mortgage directed that the mortgaged property should be sold discharged of all liens and claims against the company or its receivers. Intermediate the sale and its confirmation an intervening petition was filed seeking damages against the road and its receivers, which claim was resisted, but was subsequently determined in favor of the intervener without notice to the purchasers, and it was held, that after the purchasers at the sale had paid in cash the full amount of their bid and had assigned their rights to others who again assigned them to a railroad company, which presumably received a deed from the master, and took possession of the property, the court had no power to enter a decree in favor of the intervener that, should there be no money in

the hands of receivers for the payment of the damages awarded him, the purchasers of the road should pay the same.

Construction of Bill Filed by Creditors after Foreclosure—Creditor's Bill or Bill to Redeem—Multifariousness.—In *Merriman v. Chicago & E. I. R. Co.* (U. S. Cir. Ct. App. 7th Cir., Nov. 27, 1894), 64 Fed. Rep. 535, a bill filed by creditors of a railroad company against such company, another company, and others set out in substance greatly detailed the execution by the debtor company of certain invalid mortgages, trust deeds, void foreclosures of sale of property and possession by such other railroad company under the sale, and alleged that the latter company had no title to the property and was about to issue certain bonds in pursuance of a collusive agreement, and prayed for a discovery and accounting, and for an injunction restraining the sale and delivery of the bonds. The bill also contained a prayer that the property in possession of such railroad company should be decreed to be the property of the debtor company subject to the right of the company in possession to hold it as mortgagee in possession, and that the amount due the mortgagee might be ascertained and the complainant allowed to redeem and be subrogated to the rights of the mortgagees and for general relief, and it was held that the bill was one to redeem from the foreclosure and was not a creditor's bill.

It was further held that as the bill sought to redeem the property on the ground that the possession by the defendant railroad company had been fraudulently acquired, and also asked to subject to plaintiff's judgment the bonds about to be issued by the company in possession, it was multifarious.

Fees of Receivers and Counsel—Discretion of Court—Review by Appellate Court.—In *Southern California M. R. Co. v. Union Loan & T. Co.* (U. S. Cir. Ct. of App. 9th Cir., Oct. 24, 1894), 64 Fed. Rep. 450, it was held that the compensation to be allowed to counsel and receivers rests in the discretion of the trial court, and must in all cases be determined according to the circumstances of each particular case, and correspond with the decree of care, responsibility, and ability that is required; and in the absence of any abuse of the discretion, the appellate court will not interfere with the award made.

Counsel Fees—Application to Railroad Foreclosures of Minnesota Statute Fixing Attorney's Fees on Foreclosure of Real Estate Mortgages.—In *Seibert v. Minneapolis & St. L. R. Co.* (Minn., June 28, 1894), 59 N. W. Rep. 826, it was held that section 44, c. 81, Gen. St. 1878, fixing the amounts allowed as attorney's fees on foreclosure of real estate mortgages, does not apply to the foreclosure of an ordinary railroad mortgage, or limit the amount of attorney's fees, which may, by the terms of the mortgage, be allowed in case of foreclosure. The court said: "We are of the opinion that this statute was never intended to apply to the foreclosure of a railroad mortgage. There are several provisions of statute regulating the foreclosure of real-estate mortgages which it would be hard to apply to the foreclosure of railroad mortgages. A railroad is in part real estate, and in part personal property. It may as well be claimed that the statute governing the foreclosure of mortgages on chattels applies, as the statute governing the foreclosure of mortgages on real estate. In the one case the statute provides for 10 days' notice of sale, and that the sale shall be absolute. In the other case the statute provides for 6 weeks' notice of sale, and that there shall be a year after the sale in which to redeem. It is clear that a railroad, with its personal property and franchises, should be sold as an entirety. But to apply one law to one part of the property, and another law to another part, would dismember the railroad, result in great loss to the parties, and great inconvenience to the public, by reason of the consequent interruption in the public service. These difficulties presented

themselves to the supreme court of the United States in *Hammock v. Trust Co.*, 105 U. S. 77, 7 Am. & Eng. R. Cas. 465, and it was there held that the statute regulating the right to redeem real estate from the foreclosure of a mortgage thereon applied only to real estate which could be sold as such on execution; that real estate acquired and used for public purposes, by a public corporation, under its franchises, cannot be so sold. *Citing Gue v. Canal Co.*, 24 How. 257, where it was held that the real estate of a canal company, covered by the locks of the canal, could not be so sold as real estate, or separately from its franchises and other parts of its canal. A railroad, in some respects and for some purposes, is *sui generis*, and can be classed neither as realty nor personalty, but must be put in a class by itself.

Provision in Mortgage Entitling Trustee to Counsel Fees as Authorized by Resolution of Directors Providing for Mortgage with "Usual Covenant."—In *Southern California M. R. Co. v. Union Loan & T. Co.* (U. S. Cir. Ct. of App. 9th Cir., Oct. 24, 1894), 64 Fed. Rep. 450, a resolution of a board of directors authorized the issuance of bonds to be secured by a first mortgage, "with the usual covenants and agreements to fully secure the payment of said bonds," etc., and it was held that a covenant that the trustee should be entitled to just compensation, "including expenses of all necessary attorneys, counsel, or agents in and about said trust, to be paid by the party of the first part," was a "usual covenant," and was authorized by the board to be inserted in the mortgage, and that it justified the court in allowing counsel fees on foreclosure.

Allowance to Trustee.—In *Seibert v. Minneapolis & St. L. R. Co.* (Minn., June 28, 1894), 59 N. W. Rep. 826, a mortgage authorized the trustee to take possession of the property mortgaged by the railroad company, conduct its business, and, out of the proceeds of the business, to take, among other charges, compensation for the services of counsel employed by him, and in case of foreclosure to apply the proceeds of the sale first to the payment of the expenses and charges incurred by him in connection with the sale, and it was held that the mortgage allowed the payment of the charges of the trustee for reasonable attorney's fees, in part at least, out of the income of the road in the hands of the receiver, and also allowed such charges out of the proceeds of the foreclosure sale, and that it was not material to the mortgagor whether it was paid out of one fund or the other, and it was also held that, in the absence of anything to the contrary, it would be presumed that such attorney's fees were allowed only for the services rendered in foreclosing this mortgage alone, and that no part of such fees were allowed for the services rendered in the unwarranted attempt made to force prior mortgages into foreclosure, and to withhold the accrued interest due on them.

Unnecessary Litigation—Compensation to Receiver.—In *Bound v. South Carolina R. Co.* (U. S. Cir. Ct., D. S. Car., May 19, 1894), 62 Fed. Rep. 536, it was held that in an action by trustees of a second mortgage to foreclose it, in which the lien of the first mortgage is not questioned and the sale is to be made subject to it, the sole duty of the trustee under the first mortgage is to see that the decree protects and conserves the interests of the bondholders whom he represents, and for anything done by him which was neither requisite nor necessary for the protection, preservation, or benefit of his trust he should not be allowed compensation or counsel fees.

Right to Counsel Fees of Bondholders Filing Independent Bill.—In *Bound v. South Carolina R. Co.* (U. S. Cir. Ct., D. S. Car., Jan. 19, 1894), 59 Fed. Rep. 509, it appeared that a bill was filed by a bondholder on behalf of himself and all other second-mortgage bondholders seeking foreclosure on the second mortgage and sale thereunder, to which the trustees of a first consolidated mortgage were made parties; that the trustees of the first con-

solidated mortgage, having exercised a power under the deed and declared all the bonds past due, also filed their cross-bill, likewise praying for foreclosure and sale; that certain bondholders secured by such mortgage who were dissatisfied with the action of the trustees asked and obtained leave to intervene in their own behalf, filed their cross-bill, and with other relief prayed a sale subject to the lien of their mortgage; and thereafter the dissenting bondholders, who had filed their separate cross-bill, claimed that they should be reimbursed for counsel fees expended or incurred out of the general fund prior to payment of any of the liens thereon, and the court denied their claim and required them to pay their own attorneys and solicitors.

Right of Register to Commissions on Sale Made by Receiver in Another State.—In *Rome & D. R. Co. v. Sibert*, 97 Ala. 393, it appeared that bills were filed in Georgia and in Alabama to foreclose a mortgage of railroad property lying in both states, and it was held that a sale of the railroad as a unit having been made by a receiver appointed by the courts of both states, the register in Alabama was not entitled to commissions on such sale. The court said: "Our statute, § 3683 of the Code, declares the scale of commissions the register is entitled to for making sales. Section 3665 provides that 'the law of fees and costs must be held to be penal, and no fee must be demanded or received except in cases expressly authorized by law.' In *Tillman v. Wood*, 58 Ala. 578, it was said: 'The rule of statutory construction is well settled that statutes giving costs are not to be extended beyond their letter, but strictly construed, for the reason that costs are in the nature of a penalty.' See also *Dent & McGruder v. The State*, 42 Ala. 514; *City Council v. Foster*, 54 Ala. 62; *State v. Brewer*, 59 Ala. 130; 1 Brick. Dig. 417, § 6. Dorsey [the receiver] made and reported the sale in this case, and he was unquestionably entitled to commissions for making it. The register did not make the sale, and he is not entitled to commissions. To hold otherwise would be to depart from the statute, Code, § 3683, and all the rulings pronounced upon it."

Intervention—Jurisdiction of Federal Court to Render Judgment in Intervention which it could not Render in an Independent Suit.—In *Clyde v. Richmond & D. R. Co. and Central Trust Co. v. Same*, (U. S. Cir. Ct., N. D. Ga., Sept. 20, 1894), 65 Fed. Rep. 336, it was held that the United States circuit court has no jurisdiction upon intervention in a foreclosure suit to render a general judgment which it would be without jurisdiction to render in an independent suit. The court said: "The petitioner has sought the wrong jurisdiction. He should either have remained in Alabama, and presented his claim to the circuit court of that state, or, if he left that district, he should have gone to the court of primary jurisdiction in this case, namely, the circuit court of Virginia. Any other course than this would lead to the most inextricable confusion in the disposition of cases of this sort. In the next place, the petitioner had received that at the hands of the special master—a general judgment against defendant—which he could not in any way obtain in the circuit court here. Because the court holds in its hands the assets of a Virginia corporation is no reason why it should entertain an original suit against that corporation by a citizen of Alabama seeking a general judgment against it."

Right of Person who has Obtained Judgment in One State to Intervene in a Suit in Another State Ancillary to the Main Suit in a Third State.—In *Clyde v. Richmond & D. R. Co. and Central Trust Co. v. Same* (U. S. Cir. Ct., N. D. Ga., Sept. 20, 1894), 65 Fed. Rep. 336, it was held that one who had obtained a judgment against a railroad company in Alabama could not intervene in a suit pending in Georgia which was ancillary to the main suit in Virginia, for the purpose of establishing his judgment against the mortgagor company. The court said: "Where a continuous line of railway

runs through several districts, and the court in each district, in appropriate proceedings, recognizes the same receivers, for the railway, neither court, with the proper regard for the comity of courts, will go beyond its own jurisdiction and interfere with the management of the property in another jurisdiction. Nor will any one court undertake to pass upon the claim of those whose rights and lien would seem to be dependent upon and peculiar to another jurisdiction. * * * The rule, well established in practice and recognized by the supreme court in *Krippendorf v. Hyde*, 110 U. S. 276, and other cases, is that ancillary proceedings and original dependent bills, as well as interventions, will be entertained, notwithstanding the necessary diverse citizenship does not exist, provided the subject-matter of the ancillary proceeding or intervention is so connected with the original proceeding of which the court has acquired jurisdiction as to make it proper and necessary for the determination of the rights of the parties to do so. This does not affect the case as presented here, however. It is controlled on other grounds."

Retaining Irregular Petition in Intervention where Facts are Sufficient to Authorize Relief.—In *Central Trust Co. of N. Y. v. Marietta & N. G. R. Co.*, Morse, intervener (U. S. Cir. Ct., N. D. Ga., April 20, 1894), 68 Fed. Rep. 492, it was held that while the right of a bondholder to have a trust deed construed and the right of certain bonds to participate in a fund to be derived from the sale of the property covered by the trust deed to be determined is more properly presented by intervention, yet where the parties have filed what is styled an "intervening petition," which is not such in fact, but the allegations and the prayer are sufficient, and the proceedings are brought in the court where the bill to foreclose the mortgage is pending, and where the proceeds must be distributed, the court may entertain it and grant the relief sought.

Appealability of Order Directing Sale of Rolling-stock to Satisfy Claims of Interveners.—In *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, it was held that where a receiver has been appointed for a railroad corporation in an action brought for that purpose, an order made in intervention by preferred creditors against the mortgagee of the property directing the sale of the rolling-stock to satisfy the claims of the interveners is appealable, since the title to the rolling-stock is thereby absolutely determined adversely to the claim of the mortgagee.

Appeal from Order Incident to Receiver's Suit—Inquiry by Appellate Court into Regularity of Appointment of Receiver.—In *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, it was held that where an appeal is taken from an order made upon a complaint in intervention by preferred creditors against a mortgagee of the railroad company, and the order is one incident to the receiver's suit, such bill is not an attack upon the order appointing the receiver, and the appellate court cannot inquire into the regularity of the proceedings which led up to the appointment.

Sufficiency of Service of Notice of Appeal on Receiver.—In *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, it was held that under a statute requiring all parties not joining in an appeal to be served with notice, service upon a receiver of a railroad property and the joinder or notification of all parties to the proceedings in intervention is sufficient.

BOSTON SAFE DEPOSIT & TRUST CO. v. RICHMOND & DANVILLE R. Co.

FINANCE CO. OF PENNSYLVANIA *et al.* v. CHARLESTON, CINCINNATI & CHICAGO R. Co. *et al.*

(*United States Court of Appeals, 4th Circuit, May 22, 1894, 62 Fed. Rep. 205.*)

Propriety of Order Allowing Payment of Wages and Sums Due Connecting Lines out of Proceeds of Sale on Foreclosure.—An order appointing a permanent receiver in an action to foreclose a railroad mortgage contained a provision authorizing the receiver to pay all wages due to employes at the date of the order appointing a temporary receiver, for labor and services within 90 days before the same, and also all balances due to other carriers and connecting lines and necessary to be paid for the conducting of the road. *Held*, that the order was providently made, and could not be considered as limiting the payments by the receiver to the current earnings, in view of the fact that the road was run at a loss, but that such payment might be made out of the proceeds of sale on foreclosure.

Sufficiency of Petition by Creditor Company to Authorize Payment of Account out of Proceeds of Sale.—The intervening petition of a creditor company prayed for payment of its account for freight, exchange charges, etc., out of the earnings of the road, and for general relief. *Held*, that the petition was sufficient, under the prayer for general relief, to justify a decree authorizing the payment of the amount due out of the amount realized on a sale of the debtor road.

Possession of Collateral for Claim Against Debtor Company as Waiver of Right to Payment out of Proceeds of Sale.—The holding of a note and bonds of the debtor company by the intervener as collateral for the debt under an express agreement that the note was to be considered as payment only "when paid," was not a waiver of its right to have recourse to the proceeds of sale.

Adjustment of Rights in Favor of Other Creditors of Mortgage Debtor, Arising by Way of Subrogation, because of the Collateral.—Rights arising in favor of others by subrogation or otherwise because of such collateral, may be adjusted and determined upon payment of a decree in favor of the creditor company.

APPEAL from United States circuit court for the district of South Carolina.

The facts, as sufficiently stated by counsel, are these: On December 10, 1890, the Finance Company of Pennsylvania, and others, complainants, filed their bill in the circuit court of the United States for the district of South Carolina, against the Charleston, Cincinnati & Chicago Railroad Company, the Boston Safe Deposit & Trust Company and others, alleging:

Case stated. The incorporation of the railroad company for the purpose of constructing and operating a railroad from Charleston S. C., to Ashland, Ky., a distance of 620

miles; the execution and delivery to the Boston Safe & Deposit Company, on August 9, 1887, of a mortgage upon said railroad, to secure an issue of bonds to the amount of \$15,500,000, which were delivered to said Boston Company; a contract for construction of the railroad, with a construction company, the partial performance of this contract, and the delivery to the construction company of over \$7,000,000 of these bonds, and the purchase by complainants from said company of a portion of said bonds; the completion and operation of a part of the railroad; the insolvency of the construction company, and its inability to complete its contract; the insolvency of the railroad company; its inability to complete the road or to operate the completed portion; want of rolling-stock; suits pending; no credit with which to purchase fuel, oil, waste, and other necessary supplies; non-payment of employés for several months. Complainants therefore prayed the appointment of a receiver.

The railroad company and the construction company answered, joining in the prayer; the deposit company admitted the first three paragraphs of the bill, and required proof of the remainder.

On December 10, 1890, Samuel Lord was appointed temporary receiver, but the order made no provision for payment of any balances to connecting lines, or for the payment of any ante-receivership indebtedness. On February 26, 1891, D. H. Chamberlain was appointed permanent receiver, by an order of said court, "with all the authority and duties prescribed in the order hereinbefore made, naming Samuel Lord, Esq., temporary receiver," which order contained the following provision: "That said receiver be further authorized to pay all the wages due to the employés, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines, and necessary to be paid for the conducting of the said railroad." On March 16, 1891, Chamberlain, the receiver, filed his petition asking to be allowed to issue \$30,000 of certificates to pay certain obligations found due and unpaid upon entering upon his duties as permanent receiver, aggregating \$48,901.93. These consisted of taxes, freight balances due on December 10, 1890, freight balances and freight due since that date, and amounts for cross-ties, coal, and other supplies. With the cash on hand, and estimated receipts for some days in March, and the proceeds of these certificates, the receiver stated in his petition he would be able to pay off all said indebtedness, except \$5,247.12. This he proposed to pay along with the

future current expenses, out of the future current earnings. Leave was granted to issue said certificates, March 17, 1891.

On August 4, 1891, the Richmond & Danville Railroad Company filed its intervening petition, setting out its account against the railroad company in full, accruing both before the appointment of the temporary receiver and subsequently, and praying that it be paid out of the earnings of the road, and for general relief. This was referred the same day to a special master, to take testimony and report, but no proceedings were had under this order until after the sale of the road, when, on July 11, 1893, the reference was proceeded with. The account consisted of four classes of items: (1) Amount due on account of claims, \$75.44; (2) amount due on Blackburg Crossing, \$1057.65; (3) amount due on freight, \$5422.94; (4) amount due freight balances, \$8095.58.

It appeared, in the testimony returned by the master, that the Richmond & Danville Company held, as against the account in question, a note of the Charleston, Cincinnati & Chicago Company for \$10,000, secured by certain first-mortgage bonds of that company, the note "to be payment when paid," and counsel for the deposit company, trustee, claimed that, upon the settlement of the account, the trustee was entitled to the return of the collateral bonds, or to an accounting for their value.

It was admitted that the Charleston, Cincinnati & Chicago Company was run at a loss, both before and since the appointment of a receiver, and that the earnings of the receiver had been more than absorbed by running expenses; also, that there had been no diversion of income to payment of interest.

The master having made his report, the application of the intervenors to be paid out of the proceeds of sale came on to be heard in the circuit court, before SIMONTON, J. The court allowed the first item, which was admitted; disallowed the second item; allowed the third and fourth items,—and rendered a decree August 24, 1893, for the sum of \$13,421.95 (made up of the three items allowed, with a deduction of credits amounting to \$172.01), with interest from December 11, 1890. From this decree, the Boston Safe & Deposit Company prayed an appeal to this court, and assigned errors as follows:

1. That the court erred in ordering the sum of \$5422.94, made up of items of freight charges of the Richmond & Danville Railroad Company against the Charleston, Cincinnati & Chicago Railroad Company for cars and other articles of freight carried by the former company for the last-named

company, and delivered to it as consignee and owner, to be paid out of the proceeds of sale.

2. That the court erred in ordering the freight balance of \$4376.19, due by the Charleston, Cincinnati & Chicago Railroad Company to the Richmond and Danville Railroad Company, to be paid out of the proceeds of sale.

Samuel Lord, for appellants.

T. P. Cothran, for appellees.

Mr. Chief Justice FULLER (after the foregoing statement.)—It was conceded, on the argument, that the item mentioned in the second assignment of error related to a balance due by the receiver of the Charleston, Cincinnati & Chicago Railroad Company to the Richmond & Danville Railroad Com- Construction
pany, which had accrued subsequent to his appoint- of order.
ment, and which, as a matter of fact, had been paid, and we assume that the intention of counsel was to question the allowance of the fourth item for \$8095.58, and it will be so regarded. The two items complained of were for freight on shipments of coal, cars, oil, etc., consigned to the Charleston, Cincinnati & Chicago Railroad Company for its own use, and which were turned over by the agent of the Danville road to the agent of the former road at Blacksburg, the Danville road being charged with all back charges, and paying them; and for balances of freight exchange found to be due by the Charleston, Cincinnati & Chicago Company to the Danville Company. The order of February 26, appointing the permanent receiver, expressly authorized him "to pay all the wages due to employés, at the date of the order appointing the temporary receiver herein, for labor and services within ninety days before the same, and also all balances due to other carriers and connecting lines and necessary to be paid for the conducting of said railroad." This was such an order as is frequently made in these cases, and cannot properly be construed as limited to payment out of current earnings, especially in view of the condition of the road. The liabilities which made up the two disputed items accrued prior to December 11, 1890, and the bill was filed, and the temporary receiver appointed, on December 10. On March 16, 1891, the permanent receiver was granted leave to issue \$30,000 of certificates, with which to meet obligations, which included freight, balances for freight, cross-ties, coal, and other supplies, which certificates were necessarily a charge upon the corpus of the estate. It does not appear that appellant raised any objection to either of these orders, although, if it considered them objectionable or injurious to its interests, it might well have applied to the court to cancel or modify them. *U. S. Trust Co. v. Wabash W. Ry. Co.*, 150

U. S. 287, 303, 60 Am. & Eng. R. Cas. 480; *Miltenberger v. Railroad Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464.

It must be regarded as settled that a court of equity may make it a condition of the issue of an order for the appointment of a receiver of a railroad company that certain outstanding debts of the company shall be paid from the income that may be collected by the receiver, or from the proceeds of sale; that preferential payments may be directed of unpaid debts for operating expenses, accrued within 90 days, and of limited amounts due to other and connecting lines of road for materials and repairs and for unpaid ticket and freight balances, in view of the interests both of the property and of the public, that the property may be preserved and disposed of as a going concern, and the company's public duties discharged; and that such indebtedness may be given priority, notwithstanding there may have been no diversion of income, or that the order for payment was not made at the time, and as a condition, of the receiver's appointment, the necessity and propriety of making it depending upon the facts and circumstances of a particular case, and the character of the claims. *Miltenberger v. Railroad Co.*, 106 U. S. 286, 311, 12 Am. & Eng. R. Cas. 464; *Trust Co. v. Souther*, 107 U. S. 591, 594, 11 Am. & Eng. R. Cas. 707; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 25 Am. & Eng. R. Cas. 560; *Morgan L. & T. Railroad & Steamship Co. v. Texas Cent. Ry. Co.*, 137 U. S. 171, 45 Am. & Eng. R. Cas. 631; *Kneeland v. Foundry Works*, 140 U. S. 592, 48 Am. & Eng. R. Cas. 675. Of course, the discretion to enter such orders should be exercised with great care, but as late as *Thomas v. Car Co.*, 149 U. S. 95, 110, the Supreme Court quoted the remarks upon the doctrine and its proper application in *Miltenberger v. Railroad Co.*, *supra*, with approval, although as observed by this court in *Bound v. Railway Co.*, 58 Fed. Rep. 473, 7 C. C. A. 322, the tendency of that case was to narrow the limits within which an equity court should confine itself in making such allowances.

We are of opinion that the order of February 26, 1891, was providently entered, and that the circuit court did not err in its decree. The petition was sufficient, and the relief awarded, being consistent with the case made, was grantable under the prayer for general relief. The allowance of interest from the date of the appointment of the temporary receiver was, perhaps, open to question, but no error is assigned in regard to it, and, under the circumstances, we do not feel called upon to disturb the decree on that account.

Property of
order.

Something was said upon the argument in respect of the note and bonds of the Charleston, Cincinnati & Chicago Company, taken and held by the Danville Company, but that was as collateral to the original obligation, and the express agreement was that the note was to be considered as payment only "when paid." This was no waiver of the right to come upon the fund, and, when the amount of the decree is paid, whatever rights in that collateral appellant may be entitled to, by way of subrogation or otherwise, can be adjusted and determined.

Waiver by
possession of
collateral.

Decree affirmed.

Priorities—Precedence of Claims for Personal Injuries over Mortgage, under Georgia Code.—In *Finance Co. of Pennsylvania v. Charleston, C. & C. R. Co.* (*Ex-parte Hudson*), U. S. Cir. Ct., D. S. Car., May 2, 1894), 61 Fed. Rep. 369, it was held that section 1255 of the Georgia Code, which provides that mortgages on corporate property or earnings shall not have power to exempt such property from execution for the satisfaction of any judgment obtained against the corporation for torts committed by such corporation or its agents or employes, whereby any person is injured, any clause or clauses in such mortgage to the contrary notwithstanding, has the effect of giving a judgment for personal injuries against a railroad company precedence over a prior mortgage, upon distribution of the proceeds of the mortgaged property on foreclosure.

Possession by Mortgages after Appointment of Receiver—Priority Over Creditors.—In *Radebaugh v. Tacoma & P. R. Co.*, 8 Wash. 570, it was held that the appointment of a receiver of a railroad corporation has the same effect as though the creditors whom he represents had taken possession of the rolling-stock under legal proceedings, and that, therefore, the right of a mortgagee of the corporation to take possession of the rolling-stock will not give such mortgagee any priority over creditors when its right of possession accrues subsequent to the appointment of the receiver.

Priority of Coupons Payable as Rental of Mortgaged Road Over Lien of Mortgage.—In *Central Trust Co. of N. Y. v. Charlotte, C. & A. R. Co.* (Wylie, intervener), (U. S. Cir. Ct. D. S. Car., Jan. 5, 1895), 65 Fed. Rep. 264, it was held that coupons attached to bonds issued by a railroad company which under an agreement of lease are payable as rentals of the road leased by the maker of the bonds, were not any portion of the operating expenses of the road so as to entitle them to priority in payment over the lien of a mortgage. *Citing* *Thomas v. Car Co.*, 149 U. S. 111; *Railroad Co. v. Humphreys*, 145 U. S. 102, 51 Am. & Eng. R. Cas. 38; *Kneeland v. Trust Co.*, 136 U. S. 97; *United States Trust Co. v. Wabash W. R. Co.*, 150 U. S. 289, 60 Am. & Eng. R. Cas. 480; *Bound v. Railway Co.*, 58 Fed. Rep. 480; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. Rep. 281. *Distinguishing* *Miltenberger v. Railroad Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464.

The court said: "It will be observed that the covenant of the lessee is the consideration for the letting of the road for 99 years. It contains three items,—a dividend to stockholders of a fixed sum semi-annually; the assumption of the payment of the mortgage debt; and, as a corollary for this, the payment of the coupons on this debt as they mature. No allusion whatever is made to current earnings. No percentage of them is payable

to the lessor, as in *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 33 Am. & Eng. R. Cas. 16, but it is a promise to pay certain moneys, and to do certain things, absolutely and at all events. This is a contract between the lessor and lessee upon the responsibility of the latter, secured by no lien, subject to all the contingencies of business. After this contract was made, the lessor company, for a present valuable consideration, gave a lien, by way of mortgage of its own property, to the complainant in this case. This was recorded, and gave a paramount lien.

* * * The doctrine is this: Railroads are of great public benefit. They are clothed by the public with valuable franchises. These franchises are bestowed upon them in order to promote prompt and easy communication between the several portions of this country. To maintain and preserve its usefulness, the railroad must be kept a going concern. Whatever expenditures are absolutely necessary to this end are always protected by the courts of equity, even against vested liens when the latter seek the aid of that court. In effect, the holders of these liens take them subject to this equity. But it is not every expenditure made by a railroad company in aid of its operations, nor every contract extending and widening its field of operations, which is entitled to this equity. The debt incurred or the expenditure made must be necessary to keep the railroad a going concern,—such a debt or such an expenditure as without it or one like it, the road would cease its operations. * * * The rental under a lease is no more a part of the operating expenses of a railroad than the rental for cars and locomotives in actual daily use on the road. Yet from *Fosdick v. Schall*, 99 U. S. 235,—the case which recognized and enforced this equity relied on, down to *Thomas v. Car Co.*, 149 U. S. 95, the last reported case on this doctrine the rental of cars necessary to operate the road for six months prior to the receivership was disallowed as a claim on the fund. * * * The only case in the federal court which seems to adopt a contrary doctrine is *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 33 Am. & Eng. R. Cas. 16. In that case the leased line was a part of the main trunk, over which all the business of the road passed, and by which alone the line reached the Mississippi. The terms of the lease were payment of 30 per cent of the gross earnings of the leased line. The facts of the case did not bear out the contention that these earnings had been diverted, nor enable the court to pass upon the contention that the gross earnings of the leased road were a fund impressed with a trust to pay 30 per cent of them to the lessor. In consequence of this, the case gave no preference to the claim for rent of this leased line. All that the justice says on the preference of rent is *obiter dictum*. At all events, it is in conflict on this point with every other case on the subject, and for this reason, apparently, Mr. Justice BREWER alludes to it in *Kneeland v. Trust Co.*, 136 U. S., at page 98, 43 Am. & Eng. R. Cas. 519:

“It is the exception, and not the rule, that such priority of liens can be displaced. We emphasize the fact of the sacredness of contract liens for the reason that there seems to be growing an idea that the chancellor, in the exercise of his equitable powers, has unlimited discretion in this matter of displacement of vested liens. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. Ry. Co.*, 125 U. S. 658, 33 Am. & Eng. R. Cas. 16.

* * * In the case at bar the receivers of the Charlotte, Columbia & Augusta Railroad Company never took charge of the leased property, nor used it a day. They assumed charge of and conducted the mortgagor road. This itself is a circumstance going to show that the use and control of the leased lines were not necessary in order to keep the mortgaged road a going concern. The consideration expressed in this lease does not appear to be one of those exceptional claims which are given precedence over a vested lien.”

Right of Mortgagor to Assign Determination of Priorities as Ground of Error.—In *Seibert v. Minneapolis & St. L. R. Co.* (Minn., June 28, 1894), 59 N. W. Rep. 822, it was held that where the junior mortgagee makes the holders of prior mortgages parties to a suit to foreclose his mortgage, and the court declares his mortgage prior, as to certain of the mortgaged property, the mortgagor is not aggrieved thereby, and cannot, on his appeal, assign this as ground of error.

DAVIS

v.

MERCANTILE TRUST CO.

(152 *United States*, 590.)

Appeal by Intervening Bondholders from Order Confirming Sale on Foreclosure—Necessary Parties to Appeal.—Where a foreclosure suit is brought by a trustee named in a railroad mortgage given to secure certain bonds, one who has intervened to protect his personal interests as a holder of such bonds and of stock in the company, cannot appeal from an order confirming a sale of the mortgaged property without making the mortgagor, the other defendants, and the purchasers of the property parties thereto.

Necessary Parties to Appeal from Decree by Interveners.—Nor will an appeal lie by the intervener from the decree without making the mortgagor a party to such appeal.

APPEAL from the circuit court of the United States for the southern district of Ohio.

On February 18, 1889, the Mercantile Trust Company of New York filed in the circuit court of the United States for the southern district of Ohio its bill against the Kanawha & Ohio Railway Company. The bill Case stated. alleged that on May 1, 1886, the defendant, the Kanawha & Ohio Railway Company, issued a series of bonds, and on the same day executed to the Mercantile Trust Company its mortgage or deed of trust to secure the payment of the principal and interest of such bonds. It alleged a default in the payment of interest due on January 1, 1889, as well as the existence of a large floating debt, and prayed the appointment of a receiver, and a decree of foreclosure and sale. On February 19th the defendant entered its appearance, and on the same day a receiver was appointed, who qualified, and took possession of the mortgaged property. Subsequently, and on July 24th, an amended bill was filed, making additional parties defendant the Toledo & Ohio Central Railway Company and the Shawnee & Muskingum River Railway Company. On

October 26th a decree *pro confesso* was entered against the latter company. On October 30th, Erwin Davis, the present appellant, filed a petition alleging that he was the owner of more than \$100,000 of the bonds secured by the mortgage or deed of trust sought to be foreclosed in this suit, and also the owner of more than \$500,000, par value, of each class of stock of the defendant the Kanawha & Ohio Railway Company, to wit, first and second preferred, and common, and asking for the removal of the receiver on the ground of his incompetency, and the appointment of some capable and disinterested person as such receiver. On the same day a decree *pro confesso* was entered against the Kanawha & Ohio Railway Company. On November 13th the petition of Davis for the removal of the receiver, and the appointment of another in his stead, was denied, and at the same time this order was made: "It is further ordered that said Erwin Davis be and is permitted to intervene herein, and that he have liberty to be heard upon any and all proceedings herein for the protection of his interests as bondholder and stockholder of the Kanawha & Ohio Railway Company."

On November 29th the Toledo & Ohio Central Railway Company filed its consent to the entry of a decree according to the prayer of the amended bill of complaint, and that, the "cause proceed in like manner as if an order *pro confesso* had been duly entered against it more than thirty days prior" thereto. On December 5th Davis filed a second petition, reciting his interest as before, and in addition alleging the existence of certain prior mortgage liens upon the property described in the plaintiff's bill, or part of it; that in the bill there was claimed that the Kanawha & Ohio Railway Company had a floating debt of about \$330,000; that since the filing of the bill that company had confessed judgment in favor of the Kanawha Improvement Company in a court of West Virginia for the sum of \$285,232.20; and that as a bondholder and stockholder of Kanawha & Ohio Railway Company, on behalf of himself and all other stockholders and creditors, he had filed a bill in the circuit court of the United States for the district of West Virginia, attacking such judgment so confessed, on the ground of fraud, and praying that it be canceled, set aside, and held for naught. He attached a copy of this bill, and closed the petition in these words:

"Your petitioner respectfully represents that he is advised that no decree of sale of the property included in said mortgage should be decreed until a reference is had to ascertain the liens which shall have been first ascertained thereon, the amounts thereof, and the order of their priorities; that a sale

should not be decreed until the validity of the judgment referred to shall have been first adjudicated.

"Petitioner therefore prays that this his petition be read and considered at the hearing; that your honors will not at said hearing enter a decree of foreclosure, as prayed for in said bill, until the matters of this petition have been fully heard and a proper reference to a master be made to ascertain all liens upon said railroad, and the order of their priorities, and that petitioner have full relief in the premises; and, as in duty bound, he will ever pray," etc.

On the same day, to wit, December 5, 1889, a decree of foreclosure and sale was entered. That decree found a default in the payment of interest, and decreed a sale unless such interest should be paid within 30 days. At the close of the decree was this entry: "Thereupon, came the intervening petitioner, Erwin Davis, and prayed the court for the allowance of an appeal, with *supersedeas*, from the foregoing decree, and the court thereupon refused the appeal."

Subsequently, an application was made to Mr. Justice HARLAN, of this court, for an appeal; and on February 11, 1890, it was allowed. The only security given on this appeal was a cost bond, in the sum of \$500, executed by Davis and his surety to the appellee, the Mercantile Trust Company, alone. This bond was approved February 27, 1890, and a citation was then signed by Mr. Justice HARLAN; the citation running to the Mercantile Trust Company, the Kanawha & Ohio Railway Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railway Company. This was served on the Mercantile Trust Company, the Toledo & Ohio Central Railway Company, and the Shawnee & Muskingum River Railroad Company, but not on the Kanawha & Ohio Railway Company, the mortgagor. No *supersedeas* bond having been executed, a sale was had under the decree on March 4, 1890, and the property struck off to Nelson Robinson and William B. Post for the sum of \$505,000. On April 7, 1890, this sale was confirmed, and a deed ordered. From such order of confirmation, Davis prayed an appeal, which was allowed. On such appeal, also, a cost bond to the Mercantile Trust Company, alone, was given, and a citation issued, running only to the Mercantile Trust Company.

Walter S. Logan and Chas. M. Demond, for appellant.

Thomas Thacher, for appellee.

Mr. Justice BREWER, after stating the facts in the foregoing language, delivered the opinion of the court.

As a preliminary matter, the standing of the appellants in

this court is challenged. In the court below he was not a party to the record, either plaintiff or defendant; **Deficiency of parties to appeal.** was never substituted for either; filed no bill, cross-bill, or answer; but was simply permitted to intervene, with liberty to be heard upon any and all proceedings for the protection of his interests as bondholder and stockholder. Assuming, under the authority of *Williams v. Morgan*, 111 U. S. 684, 698, that this gave him a right of appeal from any decision of the circuit court affecting his interests, it did not change the ordinary rules respecting appeals, one of which is that all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal. The rule, and the reasons therefor, are fully stated in *Masterson v. Herndon*, 10 Wall. 416, and restated in *Hardee v. Wilson*, 146 U. S. 179, 181, and need not, therefore, be again repeated. See, also, *Inglehart v. Stansbury*, 151 U. S. 68.

In this case the appellant has taken two appeals—one from the decree, and the other from the order confirming the sale. These appeals being taken separately, each must stand or fall on its own merits. Noticing first the appeal from the order of confirmation, it will be seen that the sale confirmed was of the mortgaged property to Robinson and Post for the sum of \$505,000, of which sum \$50,000 had been paid in cash by the purchasers, and the balance secured by a deposit of \$1,069,000, first-mortgage bonds of the Kanawha & Ohio Railway Company—the bonds in suit. Who is more vitally interested in the question whether such sale and confirmation shall stand than these purchasers? If the sale be set aside, they lose the purchased premises, and all the profit which might result from their purchase, and assume all the risks and delay in recovering that which they have paid into court. In *Kneeland v. Trust Co.*, 136 U. S. 89, 95, 43 Am. & Eng. R. Cas. 519, this court said that “supported by sound reasons are the following propositions: “First, a party bidding at a foreclosure sale makes himself, thereby, a party to the proceedings, and subject to the jurisdiction of the court, for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising, affecting his bid, which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree.”

Again, not only is the purchaser interested, but also the mortgagor. He may be satisfied with the sale which was made—may believe that at no other sale would it be possible to realize so much in satisfaction of his indebtedness. At

any rate, the setting aside of one sale, and the ordering of another, may affect prejudicially or beneficially, his interests, and because of that he has a right to be heard upon the question of setting it aside. Now, the only party respondent to this appeal is the trustee. It is the only party named as obligee in the cost bond. The citation, in terms, runs to it, only; and there is no pretense that the mortgagor or the other defendants, or the purchasers at the sale, have ever been brought into this court to respond to this appeal. Manifestly, it would be the grossest injustice to attempt to determine the question of the validity of this sale in the absence of these so vitally interested parties.

Neither does the appeal from the decree stand in any better condition. In a decree for the foreclosure of a mortgage, the two partes principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree, unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary, in any given case, to determine that his interests would or would not be promoted by the setting aside of the decree. It is not enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside without giving him a chance to be heard in its defense. Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation, on its face, runs to all the parties to the record, it was not served on the mortgagor, the Kanawha & Ohio Railway Company; and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal. The appellant seems to have assumed that he was authorized to represent the corporation mortgagor and all the stockholders, but this is obviously a mistake. He was not by order of court substituted for the defendant mortgagor, nor was he allowed to represent

the mortgagor or to carry on its defense. The only authority given to him was to intervene for the protection of his personal interests as bondholder and stockholder. The corporation mortgagor still represented all the other stockholders, as did the trustee and all the other bondholders; and while the appellant appears to have had a considerable interest, both as stockholder and bondholder, it was only a minor fraction. Out of 1160 bonds, 1069 (all but 91) were tendered by the purchasers upon application for confirmation of sale; and, while he claims to be the owner of \$1,500,000 of the stock, it appears that the total amount thereof was \$12,200,000. So that, in fact, he was the owner of less than one-eleventh of the bonds, and one-eighth of the stock. No authority from these other bondholders or stockholders to him to act for them is shown. So that neither in fact nor in law was he representing the corporation mortgagor in this litigation; and, as that mortgagor was interested in, and affected by, the decree of foreclosure and sale, it should have been made a party to this appeal, and brought into this court, and because of the failure so to do the appeal cannot be maintained.

For the reasons above given both appeals are dismissed.

Mr. Justice JACKSON did not hear the argument, or take any part in the decision of this case.

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